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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

JUSTIN SLABY,	)	Case 1:12-cv-01235
	)	
Plaintiff,	)	
	)	
v.	)	Alexandria, Virginia
	)	July 29., 2013
ERIC HIMPTON HOLDER, JR.,	)	1:09 p.m.
	)	
Defendant.	)	Day 1
	)	Pages 1 - 177

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TRANSCRIPT OF TRIAL  
  
BEFORE THE HONORABLE ANTHONY J. TRENGA  
  
UNITED STATES DISTRICT COURT JUDGE  
  
AND A JURY

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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1 (A jury is duly impaneled and sworn.)

2 THE COURT: Ladies and gentlemen of the jury,  
3 I'm going to give you an idea of how we are going to  
4 proceed at this point. We're going to recess for lunch  
5 at this time. We'll resume at 2:15. As we go forward  
6 in the case -- and I'll give you more detail when we  
7 reconvene. This afternoon we will proceed until  
8 between 5:00 and 6:00. We typically will, depending on  
9 where the evidence is, break around 5:30.

10 You'll find in the jury room that there's a  
11 telephone in there. Those are for the purpose of  
12 allowing you to let friends and employers know that  
13 you'll be occupied for the next few days and to let  
14 them know what your schedule is. It's not for the  
15 purpose of conducting any business or any social  
16 conversations. So it's in there solely for the purpose  
17 of letting you let people know what your schedule is.

18 This afternoon, after we reconvene, I will  
19 provide to you preliminary instructions, and then we'll  
20 proceed with opening statements, first, by the  
21 plaintiff and then by the government. We'll take a  
22 break probably around 3:30, quarter to 4:00.

23 So with that, you're excused to the jury room  
24 until 2:15. I will tell you now for the first time  
25 what I'll tell you every time that we recess, and that

1 is that you are not to discuss this case among  
2 yourselves. Even though you know very little about it,  
3 you should not even speculate about what the case is or  
4 what the evidence may show or what the issues are.

5 So with that, you're excused until 2:15.

6 (The jury exits at 1:10 p.m.)

7 THE COURT: Please be seated.

8 We'll reconvene at 2:15, at which time we'll  
9 have opening statements. As I recall, both parties  
10 think 20 minutes is sufficient.

11 MR. GRIFFIN: Your Honor, I thought we had  
12 told you 30.

13 THE COURT: Thirty is fine.

14 MR. GRIFFIN: Okay.

15 THE COURT: With respect to the request for  
16 use of the demonstrative, I reviewed it. It's been  
17 objected to, and over objection, I'm not going to allow  
18 you to use it. I think there's too much in there  
19 that's either argumentative or may be contested or not  
20 in evidence. To the extent there are exhibits that  
21 have already been admitted, you are free to use those,  
22 as well as, obviously, to tell the jury what you expect  
23 the evidence to show. But I'm not going to let you use  
24 the demonstrative as tendered.

25 MR. GRIFFIN: Any of them?

1 THE COURT: Any of them.

2 MR. GRIFFIN: Okay.

3 THE COURT: Okay. Anything else?

4 (No response.)

5 THE COURT: We'll stand in recess until 2:15.

6 Yes.

7 MS. BUTLER: Your Honor, is it possible that  
8 we could address something just right before we come  
9 back, like at 2:10 or whatever?

10 THE COURT: Sure. Give me a heads-up. What  
11 do you want to know about?

12 MS. BUTLER: Okay. I have two issues. One  
13 relates to this issue of whether the defendant is  
14 allowed to present all of these extraneous issues. I  
15 would like to present to the Court an affidavit that  
16 one of the decision makers did before litigation --  
17 although, it was in the process, the EEO process -- for  
18 you to look at.

19 The other thing that we would like to raise  
20 for Your Honor is that Mr. Slaby was actually hired as  
21 a special agent with no conditions. The conditional  
22 offer part comes earlier, and I heard the Court say  
23 that he was hired conditionally upon completing the  
24 academy.

25 We have the hiring letter which is in

1 evidence as Exhibit 3, and we would ask that you look  
2 at it. We could talk about it because there were no  
3 conditions at that point. He was appointed as an FBI  
4 agent. He was sworn in the first day that he was at  
5 the academy. So we just don't want the jury to be  
6 under the misapprehension he was not yet an FBI agent.

7 THE COURT: Right. But it was a condition of  
8 employment that he complete the academy? No?

9 MR. GRIFFIN: No.

10 THE COURT: Tender the exhibit. I'll look at  
11 it.

12 MR. GRIFFIN: Okay. Perfect.

13 THE COURT: If you do that before the  
14 luncheon break, I'll look at it.

15 Anything else?

16 MR. GRIFFIN: No, Your Honor.

17 THE COURT: We'll stand in recess.

18 (Recess from 1:14 p.m. until 2:14 p.m.)

19 (The jury is not present.)

20 THE COURT: All right. Ms. Butler, I've  
21 reviewed what you've given me. What is it that you are  
22 specifically asking at this point?

23 MS. BUTLER: Your Honor, we're asking for two  
24 things. One is regarding his hiring, that the jury be  
25 instructed that he was hired -- we don't know how else

1 to do it because he was hired as a special agent -- and  
2 please ignore previous comments or something to that  
3 effect. I don't know.

4 THE COURT: Well, I'll tell them just as a  
5 matter of course that nothing the Court has said is  
6 evidence in the case or nothing that I do say should  
7 indicate anything concerning the merits of the case. I  
8 just think getting more into it is going to complicate  
9 things. But I'll make a general statement like that.

10 MS. BUTLER: Could we ask that the defense  
11 not say anything as the judge told you it was all  
12 contingent? Could we at least ask for that as a  
13 relief?

14 THE COURT: Well, I don't know what evidence  
15 they're going to present. So I don't think they should  
16 say as the judge told you, but they have a right to  
17 preview the evidence as they think they can prove it.

18 MS. BUTLER: No problem.

19 THE COURT: All right.

20 MS. BUTLER: I just don't want that to be  
21 relied on.

22 THE COURT: All right.

23 MS. BUTLER: The other thing is as  
24 Ms. Moyet-Treretola's affidavit says, there was one  
25 reason and one reason alone, and he, Mr. Mikolashek,



1 said he wanted to introduce many different reasons. As  
2 I said --

3 THE COURT: Based on what I've seen, I'm not  
4 going to restrict the scope of the evidence that they  
5 think they can prove as to what reasons they gave and  
6 why they dismissed him. Maybe you can impeach the  
7 witnesses if they say something that's inconsistent  
8 with these documents, but I'm not going to restrict the  
9 scope of proof at this point.

10 MS. BUTLER: We would also, following up on  
11 that -- my cocounsel has reminded me we don't have any  
12 order on our motion in limine. We would just ask the  
13 Court for such an order.

14 THE COURT: As to which aspect?

15 MS. BUTLER: About expert witnesses, not  
16 speculation.

17 THE COURT: Well, I think I have ruled on  
18 that. I'm going to take it up as it comes on the  
19 stand, but as a general proposition, I'm going to allow  
20 people to testify as to what they said and why they  
21 said it even if the substance of that would reflect  
22 some specialized knowledge on their part.

23 MS. BUTLER: And about speculation of future  
24 events, since these people were not designated as  
25 expert witnesses --

1 THE COURT: Well, if it was part of their  
2 current thinking at the time and it was part of what  
3 motivated whatever they said -- again, I don't think  
4 it's within the general rules that you've been talking  
5 about concerning expert testimony. But again, I'll  
6 rule definitively on that as it is presented. If you  
7 have objections, you can make them, and I'll rule on  
8 them during the trial.

9 MS. BUTLER: All right. Maybe he should be  
10 up here. He is pointing out that we had many areas  
11 that we agreed on in the motion in limine and the Court  
12 still has not ruled on that.

13 THE COURT: Again, to the extent there are  
14 specific objections, I think you should take them up at  
15 the time that the evidence is presented. It was hard,  
16 frankly, to rule in a vacuum based on the motion in  
17 limine that listed a whole range of things in terms of  
18 you wanted rulings on no speculation and things like  
19 that. But again, I'll take those up as the evidence is  
20 presented.

21 MS. BUTLER: Well, things like hiring of the  
22 lawyer, not saying, well, you know, the lawyers are all  
23 behind this. There's just a variety of really kind of  
24 standard things.

25 THE COURT: Right. And there was a general

1 response that agreed, I think, in concept with a lot of  
2 the things that you said. But to the extent there is  
3 something that comes up in a specific context -- it is  
4 going to be difficult to rule now unless it is within  
5 the context of a specific witness.

6 Anything else before we bring the jury out?

7 (No Response.)

8 THE COURT: Let's bring the jury out.

9 (The jury enters at 2:19 p.m.)

10 THE COURT: Please be seated.

11 Members of the jury, now that you've been  
12 sworn, I will give you some preliminary instructions to  
13 guide you in your participation in the trial.

14 Before I do, I want to tell you that what I  
15 say now is intended to serve as an introduction to the  
16 trial of the case. It is not a substitute for the  
17 detailed instructions on the law that I will give you  
18 at the close of the case and before you retire to  
19 deliberate on your verdict.

20 As I indicated to you in terms of the  
21 logistics of the trial, we'll begin trial every day at  
22 9:30. So you should make whatever arrangements you  
23 need in order to arrive at the jury room no later than  
24 9:15. Please reflect on what traffic challenges you  
25 may run into and allow yourself sufficient time in

1 order to get here so we can start promptly.

2           We will recess at the end of the day between  
3 5:00 and 6:00. As I say, typically around 5:30,  
4 depending on how the evidence -- where we are in the  
5 evidence.

6           We will take a morning break at approximately  
7 11:30. We will break for lunch between 1:00 and 2:00,  
8 and we'll take an afternoon break at approximately  
9 3:30. We'll take a break a little later this afternoon  
10 given our lunch hour is a bit later than normal.

11           If there's some reason that any of you need a  
12 break other than our scheduled break times, just raise  
13 your hand, and I'll try to accommodate you as best I  
14 can.

15           With respect to your duties as jurors, your  
16 purpose and duty as jurors is to determine the facts  
17 and the inferences arising from such evidence. In  
18 doing so, you must not engage in guesswork or  
19 speculation. Under our system of civil procedure, you  
20 are the sole judges of the facts.

21           If at any time I make any comments or with  
22 respect to any comments I may have already made, you  
23 are at liberty to disregard it totally.

24           It is especially important that you perform  
25 your duties diligently and conscientiously for

1 ordinarily there's no means of correcting an erroneous  
2 determination of fact by the jury.

3           You will then have to apply those facts to  
4 the law as the Court will give it to you. With equal  
5 emphasis, I instruct you that the law, as given by the  
6 Court in these and other instructions, constitutes the  
7 only law for your guidance. It is your duty to accept  
8 and follow the law as I give it to you even though you  
9 may disagree with the law.

10           The evidence from which you will find the  
11 facts will consist of the testimony of the witnesses,  
12 documents, and other things received into the record as  
13 exhibits and any facts that the lawyers agree to or  
14 stipulate to or that the Court may instruct you to  
15 find.

16           There are two kinds of evidence that you may  
17 consider, direct evidence and circumstantial evidence.  
18 Direct evidence is direct proof of a fact, such as  
19 testimony of an eyewitness. Circumstantial or indirect  
20 evidence is proof of facts from which you may infer or  
21 conclude that other facts exist. I will give you  
22 further instructions on these as well as other matters  
23 at the end of the case, but keep in mind that you may  
24 consider both kinds of evidence.

25           Certain things are not evidence and must not

1 be considered by you, and I will list them for you  
2 briefly now:

3 First, the statements, arguments, and  
4 questions by the lawyers are not evidence.

5 Secondly, testimony that the Court has  
6 excluded or told you to disregard is not evidence and  
7 must not be considered. In this regard, objections to  
8 questions are not evidence. Lawyers have an obligation  
9 to their clients to make objections when they believe  
10 evidence being offered is improper under the Rules of  
11 Evidence. You should not be influenced by the  
12 objection or by the Court's ruling on it.

13 If the objection is sustained, that is, if  
14 the Court agrees with the objection, ignore the  
15 question. If it is overruled, that is, if the Court  
16 disagrees with the objection, treat the answer like any  
17 other. If you are instructed that some item of  
18 evidence is received for a limited purpose only, you  
19 must follow that instruction.

20 If a lawyer has an objection to make, the  
21 lawyer will stand and say objection during the course  
22 of the witness' testimony. The witness will then stop  
23 speaking, and then I'll decide whether or not to allow  
24 the witness to complete that answer.

25 At times, as I indicated, I'll sometimes

1 sustain the objection. Other times I will overrule the  
2 objection, and you'll be instructed as to how to treat  
3 those rulings if any special instructions are needed.

4           Finally, anything you may have heard or seen  
5 outside the courtroom is not evidence and must be  
6 disregarded. You are to decide this case solely on the  
7 evidence presented here in the courtroom. You are not  
8 to discuss the case with anyone outside the courtroom  
9 or even among yourselves until it is submitted to you  
10 at the end of the case.

11           During recesses and overnight, you should not  
12 do any research or any Internet searches about anything  
13 you've heard in the courtroom or communicate in any way  
14 through any electronic or social media, such as  
15 Facebook or Twitter or anything of that nature.

16           During trial and beginning with these  
17 preliminary instructions, you will hear me use a few  
18 terms that you may not have heard before. Let me  
19 briefly explain a few of them most common to you. You  
20 will sometimes hear me refer to counsel. Counsel is  
21 simply another way of saying lawyers or attorneys. I  
22 will sometimes refer to myself as the Court. The  
23 plaintiff and the defendant are called the parties to  
24 this case. Here I may also refer to the defendant as  
25 the United States or the FBI since the FBI is, in

1 effect, the real party here.

2           When we say "admitted into evidence" or  
3 "received into evidence," we simply mean that this  
4 particular exhibit is now part of the trial and may be  
5 considered by you when making decisions you must make  
6 in this case.

7           The term "burden of proof" or "sustaining the  
8 burden of proof" refers to the legal requirement that a  
9 party prove what it has the obligation to prove. The  
10 Court will instruct you further concerning the burden  
11 of proof. But as a general matter, a party who has the  
12 burden of proof with respect to a particular issue must  
13 prove that issue by what we call the greater weight of  
14 the evidence or the preponderance of the evidence.

15           A "preponderance of evidence" means evidence  
16 that produces the belief in your minds that what is  
17 sought to be proved is more likely than not. This is a  
18 civil case, not a criminal case. Those of you who have  
19 sat on criminal trials or otherwise may have heard the  
20 term "proof beyond a reasonable doubt." That's the  
21 standard of proof in a criminal case. That is not the  
22 standard of proof in this case. The standard of proof  
23 here is a preponderance of the evidence, and you simply  
24 should put the criminal standard of proof out of your  
25 mind.



1           In considering this case, you will have to  
2 make judgments about the believability of witnesses'  
3 testimony. It will be up to you to decide which  
4 witnesses to believe, which witnesses not to believe,  
5 and how much of any witness' testimony to accept or  
6 reject.

7           In considering the weight and value of the  
8 testimony of any witness, you may take into  
9 consideration all the facts and circumstances in  
10 evidence. And in particular, you may consider the  
11 appearance, the attitude, and behavior of a witness;  
12 the interest of that witness in the outcome of the  
13 trial; the relationship of the witness to any party in  
14 the case; the inclination, as you judge it, of the  
15 witness to speak truthfully or not; and the probability  
16 or improbability of the witness' statements. Thus, you  
17 may give the testimony of any witness such weight and  
18 value as you may determine the testimony of such  
19 witness is entitled to receive.

20           Pay careful attention to the testimony of  
21 witnesses because contrary to what you may have heard  
22 or seen on television, witnesses will not be called  
23 back into the courtroom to repeat their testimony while  
24 you are deliberating.

25           The Court will give you complete instructions

1 at the end of the case before you deliberate, but I do  
2 want to now tell you briefly, in brief summary, what  
3 the issues are so you might better appreciate the  
4 evidence as it comes in.

5 In this case, the plaintiffs claim that the  
6 defendant violated the Rehabilitation Act and that he  
7 was damaged as a result of that violation. The Court  
8 will provide you detailed instructions at the close of  
9 the evidence concerning the requirements of that act,  
10 but briefly summarized, the act prohibits federal  
11 employers from discriminating against qualified  
12 individuals because they have a disability.

13 In order to prove his case, the plaintiff  
14 must prove by a preponderance of the evidence that he  
15 is disabled within the meaning of the Rehabilitation  
16 Act; secondly, that he is qualified, he was a qualified  
17 individual within the meaning of the Rehabilitation  
18 Act; and third, that he was subjected to an adverse  
19 employment action because of his disability. On these  
20 issues, the plaintiff carries the burden of proof.

21 Here the parties have made your job a bit  
22 easier because they've stipulated, that is, they've  
23 agreed that the plaintiff is a disabled person under  
24 the meaning of the Rehabilitation Act. Under the Act,  
25 to be a qualified individual means that the plaintiff

1 can perform either without reasonable accommodation the  
2 essential functions of the job. And a reasonable  
3 accommodation means some plausible or feasible  
4 accommodation that will let a person with a disability  
5 perform the job or be eligible for the job.

6           The FBI contends that it would have been an  
7 undue hardship to reasonably accommodate the  
8 plaintiff's disabilities, but that in any event, based  
9 on an individualized assessment of the plaintiff, the  
10 plaintiff either with or without a reasonable  
11 accommodation presented a direct threat or risk to the  
12 public health or safety of the plaintiff -- I'm  
13 sorry -- either a direct threat or risk to the health  
14 or safety of the plaintiff or some other person that  
15 cannot be eliminated by a reasonable accommodation.  
16 And the FBI bears the burden on that issue.

17           Let me explain to you a little bit about how  
18 the trial will proceed in this case. First, at the  
19 beginning of the trial, the parties will have an  
20 opportunity to make opening statements to you. The  
21 plaintiff will go first and summarize for you their  
22 theory of the case, what evidence will be, and what  
23 they expect the witnesses to say. Following the  
24 plaintiff's opening, the defense will make an opening  
25 statement explaining to you what they expect the

1 evidence to show.

2           As I indicated to you, what is said in  
3 opening statement is not evidence. The opening  
4 statement simply serves as an introduction to the  
5 evidence which the party making the opening statement  
6 intends to produce during the trial.

7           Second, after the opening statements, the  
8 plaintiff will introduce evidence that he feels support  
9 his case. They will call witnesses. The witnesses  
10 will come into the courtroom and take the stand. There  
11 may be other testimony presented by way of depositions.  
12 Following questioning by the plaintiff, the defense  
13 will question the witnesses. It's called  
14 cross-examination. After the plaintiff has presented  
15 its case, the defendant will present its case.

16           After all the evidence has been received,  
17 after all the witnesses have testified, and after all  
18 the exhibits have been admitted, then I will instruct  
19 you on the law you must apply in reaching your verdict.  
20 I will give you orally and in writing the final jury  
21 instructions concerning the law on which you must apply  
22 the evidence received during trial.

23           Following being instructed on the law, each  
24 party will present their closing argument to you to  
25 support their case.

1           Please bear in mind that no statement,  
2 ruling, remark, or comment which I have made or may  
3 make during the course of this trial is intended to  
4 indicate to you my opinion as to how you should decide  
5 the case or is intended to influence you in any way in  
6 your determination of the facts.

7           At certain times during the trial, I will  
8 need to confer privately with the lawyers and others  
9 about various evidentiary procedural issues. During  
10 these conferences, which would take place here at the  
11 side of the bench, it is not our intention to hide  
12 anything from you but simply to determine how some  
13 issues will be handled and to allow us to proceed in an  
14 orderly fashion. Please be patient with us during  
15 these conferences. We're simply taking care to ensure  
16 that the trial is being conducted fairly.

17           It's also important to the Court that your  
18 time be used efficiently and not to have you spend  
19 significant amounts of time outside the courtroom  
20 during the trial. There may be developments that  
21 require matters to be heard outside of your presence,  
22 but I'll simply do everything I can to keep those to a  
23 minimum and move things along as smoothly and as  
24 efficiently as possible.

25           Let me say a few words about your conduct as

1 jurors, some of which I have already mentioned but  
2 deserve repeating. First, I instruct you that during  
3 the trial you are not to discuss the case with anyone  
4 or permit anyone to discuss it with you. Until you  
5 retire to the jury room at the end of the case to  
6 deliberate on your verdict, you are simply not to talk  
7 about the case. Even after it is submitted to you, you  
8 must discuss the case only in the jury room with your  
9 fellow jurors.

10           Second, do not read or listen to anything  
11 touching on this case in any way. If anyone tries to  
12 talk to you about it, please bring it to the Court's  
13 attention immediately.

14           Third, do not try to do any research or make  
15 any investigations about the case on your own. Do not  
16 use the Internet to see if you can find anything about  
17 the case or anyone in the case or anything that you  
18 have heard about in the case.

19           Do not engage in any social networking about  
20 the case, and that includes anything from simple  
21 e-mails to, as I indicated, any Facebook postings and  
22 so on.

23           Each of you has or will be given a notebook.  
24 If you want to take notes during the course of the  
25 trial, you may do so. However, it is -- please

1 appreciate it is sometimes difficult to take detailed  
2 notes and pay attention to what the witnesses are  
3 saying at the same time. If you do take notes, be sure  
4 that your note taking does not interfere with your  
5 listening to and considering all of the evidence.

6           Also, if you do take notes, do not discuss  
7 your notes with anyone before you begin your  
8 deliberations. Do not take your notes with you at the  
9 end of the day. Please be sure to leave them in the  
10 jury room where they will be secured and not reviewed  
11 by anyone.

12           If you choose not to take notes, please  
13 remember that it is your own individual responsibility  
14 to listen carefully to the evidence. You cannot simply  
15 give this responsibility to anyone who is taking notes  
16 or expect to rely on anyone's notes. We depend on the  
17 judgment of all members of the jury, and you all must  
18 remember the evidence in this case.

19           I have already instructed the attorneys and  
20 the parties not to speak with you. Again, it simply  
21 doesn't look appropriate for anyone to be having  
22 contact with you during the trial. So if during one of  
23 the recesses or as you come or leave the courthouse, if  
24 you see one of the lawyers take actions to avoid having  
25 any contact with you, don't think that they're being

1 discourteous or disrespectful. They're simply  
2 following my instructions.

3           Finally, please keep in mind, again, that  
4 your job is to decide all of the factual information in  
5 the case, like who should be believed, who should not  
6 be believed. I'll decide all the legal questions in  
7 the case, like what testimony or exhibits are received  
8 into evidence and which are not. Please do not concern  
9 yourself with any of the legal questions that the Court  
10 decides.

11           It is important that you keep an open mind  
12 and not decide any issue or form any opinion in the  
13 case until the entire case has been submitted to you  
14 and you have received the final instructions of the  
15 Court regarding the law which you must apply to the  
16 evidence.

17           At the close of the evidence, I will be able  
18 to give you your complete and final instructions, which  
19 will be much more detailed than these preliminary  
20 instructions, in which you must use to guide you in  
21 reaching your decisions.

22           We're now going to proceed with the opening  
23 statements.

24           Mr. Griffin.

25                           OPENING STATEMENT



1 MR. GRIFFIN: Thank you, Your Honor. May it  
2 please the Court.

3 Initially, thank you for being a part of an  
4 important service, as Judge Trenga has mentioned, as  
5 jurors in this case.

6 A fair chance to succeed at the job you're  
7 hired to do, that's what the law you will be using in  
8 this case says everybody deserves, a fair chance to  
9 succeed in doing their job. Judge Trenga has told you  
10 a little bit about why we're here today and the law  
11 under which this case is brought. If a person is  
12 qualified for the job, a special agent, and they have a  
13 disability, they're entitled to be judged on their  
14 abilities, not their diagnosis. Second, they're  
15 entitled to reasonable accommodations if they need them  
16 to make them successful in their job.

17 At the end of this case, you're going to  
18 answer some questions and be guided by the instructions  
19 from Judge Trenga. The instructions he gives you are  
20 going to be much like what he just told you, that  
21 people with disabilities are entitled to be judged on  
22 their ability to perform the essential functions of the  
23 job and that employers have to work with them to make  
24 reasonable accommodations if they need those in order  
25 to be successful in the job.

1           There is an exception to this rule that Judge  
2 Trenga mentioned, that if it is too unfair and it has  
3 an undue hardship on the employer, then they don't have  
4 to make accommodations. You're going to hear from  
5 Judge Trenga later that if the employer here wants to  
6 say that a qualified person with a disability is a  
7 direct threat or dangerous to people, that's a burden  
8 on this side.

9           They will have the burden of proving that to  
10 you to show that they used the most objective medical  
11 information, the most current standards, and a good,  
12 reasonable judgment about risks, how imminent it was,  
13 how much risk there was, whether it was going to come  
14 up soon or whether there was any risk at all. You will  
15 find at the end of this case that the FBI cannot do  
16 this for they had no doctors, no experts at any time to  
17 evaluate Justin Slaby.

18           You will hear that all Justin Slaby asked the  
19 FBI to do was to treat him fairly and base him on his  
20 abilities to perform the 247 essential functions of the  
21 special agent position that the FBI hired this man to  
22 do.

23           You'll soon hear that the FBI has lots of  
24 experience in making an accommodation for those who  
25 have hands that have been injured or lost. You'll find

1 that there are agents -- you will hear from them in  
2 this trial. There are at least six of them who have  
3 lost the use of one of their hands, and they need  
4 accommodations because they have lost the use of their  
5 hands. They didn't have any prosthetic devices to  
6 mitigate and correct the situation that Justin faced.

7           They had to learn -- some of them, they lost  
8 their strong hand. One agent had a grenade blow up in  
9 his hand. He only has a finger and a thumb left. He  
10 was asking an accommodation not to shoot with that hand  
11 on his firearm. He was granted it. As you'll hear  
12 repeatedly in this trial, Justin needed no  
13 accommodation because he has a strong, good left hand.

14           Five others had problems with their dominant  
15 hand -- with their other hand, I should say. One in  
16 her dominant hand had a tragic accident at the  
17 hospital. She suffered breast cancer. She is in the  
18 hospital. They have got an IV in her right dominant  
19 hand administering chemotherapy agents. At the  
20 hospital while she was asleep, the hospital let it  
21 leak, the toxic chemicals in her hand. When she woke  
22 up, her hand was swollen. You'll hear from her.

23           And she's got a permanent, severe injury in  
24 her dominant hand, and she almost lost her job. But  
25 the FBI allowed her to learn how to shoot with her weak

1 hand, and she did. And she, too, doesn't do the  
2 firearms testing with her severely injured right hand.

3 Now, there are three others -- let me count  
4 them -- at least three others, one with internal brain  
5 injury where he had seizure disorder and paralysis in  
6 the hand. Another -- yet another was in a terribly  
7 tragic car wreck where he severed the ulnar nerve and  
8 can't move one arm at all. Not weapons restricted.

9 Finally, we have the sixth one who had carpal  
10 tunnel, needing carpal tunnel surgery in two hands.  
11 And yet, she was able to get a trial period even though  
12 she needed surgery for carpal tunnel syndrome.

13 And finally, one gentleman had a shoulder  
14 injury that you'll hear that he could not lift his arm  
15 passed here, 45 out of 180 degrees. And while he had  
16 that limitation, he was not weapons restricted.

17 Yes, you'll hear that these agents needed  
18 accommodations. They were granted it by the FBI. You  
19 will hear that Justin Slaby did not ask for an  
20 accommodation and that the FBI, when it hired him as a  
21 special agent with full knowledge of his left hand,  
22 they didn't think he needed an accommodation either.

23 Because when Justin was hired for this job,  
24 he asked people: I have a new left hand. Is this  
25 going to be in the way?

1           He was told two things. If you pass the  
2 fitness-for-duty examination, you will be a special  
3 agent; and number two, even if you couldn't shoot with  
4 your left hand, you can still pass the firearms  
5 qualification because you can miss all the shots --  
6 three, five shots -- with your left hand, and you still  
7 can get way enough points to pass the test.

8           So yet, when he went, though, to the Training  
9 Academy, it was a different sorry. In other words, he  
10 was hired as a special agent. You may see the letter  
11 that he received on that important day, on December 9,  
12 2010, that he was hired as a special agent, grade 10,  
13 step 1. He had -- there was conditions to it. He had  
14 to pass his PFT, physical fitness test. He had to pass  
15 his updated background information. But as you can  
16 imagine, that was a great day for Justin Slaby.

17           And you may ask why did the FBI hire him?  
18 How did he get this letter? Well, he got this letter  
19 because the FBI has a fitness-for-duty process and an  
20 application process that takes between one and two  
21 years. In this case, it took a year-and-a-half for the  
22 FBI to decide that Justin Slaby was the right man for  
23 this job.

24           Of course, you may ask, why is he the right  
25 man for this job? Well, he's the right man for this

1 job not just because of his shooting skills. He is an  
2 expert marksman, and he is -- or was an Army Ranger.  
3 And he did serve three tours in Iraq and Afghanistan.  
4 But they also chose him for his brain, his mental  
5 strength, his physical strength, and his emotional  
6 strength. All of these were evaluated.

7 But the FBI went one step further for Justin  
8 Slaby because he has a prosthetic left hand. They  
9 said, We want to be doubly sure and verify that he is  
10 qualified to perform the essential functions of this  
11 job. And you are going to hear Dr. Yoder explain to  
12 you, the FBI medical officer, that they had him go  
13 through an extra battery of tests just to make sure his  
14 left quadrant hand did not interfere with the essential  
15 functions of this job.

16 You know, they had a PhD rehabilitation  
17 person do it, and they had two FBI special agents to  
18 witness it, including one who is actually a firearms  
19 trainer. They told Justin the truth: Even if you  
20 don't shoot with your left hand, you will pass the  
21 course. You are good to go.

22 That's why the FBI hired him, because he was  
23 evaluated before he was hired to make sure that he was  
24 qualified to perform all of the essential functions of  
25 the job.

1           So you ask -- and you have every right to  
2 ask, and you will find out in this trial -- what  
3 happened to Justin's left hand? Well, you are going to  
4 hear that he has a state-of-the-art prosthetic left  
5 hand. It is different from yours and my hands, but you  
6 are going to find out that in some ways, it is strong.  
7 He's a more accurate shooter and has better  
8 self-defense with his left hand now than he did before  
9 what happened to it.

10           I'm going to tell you what it was. He was an  
11 Army Ranger and was in training, and a faulty grenade  
12 blew up in his left hand. He got state-of-the-art  
13 help, good doctors, good physical therapists. And he  
14 actually battled the long road back to recovery, but  
15 recover he did. Recovery to the point where he got to  
16 December 9, 2010, when he was appointed as a special  
17 agent in the FBI.

18           That was important day, you'll hear. It was  
19 an important date for this family because by this time,  
20 he was married and had small children. This would be  
21 his career. But it was also a big day in the life of  
22 the FBI because Justin was the first person the FBI had  
23 ever hired who had -- was a wounded warrior with a  
24 prosthetic left hand. You will hear from numerous  
25 witnesses in this courtroom: He was the first special

1 agent ever hired with a prosthetic left hand.

2 But when he got -- when the FBI made this  
3 decision, they had full knowledge of his left hand.  
4 But when he got to the Training Division, it was a  
5 little bit of a different story. I'll tell you what I  
6 mean by that. When he got to the FBI Training  
7 Division, they already knew he was coming. They had  
8 heard that the first person with a prosthetic hand was  
9 coming to the Training Division.

10 The trainers went and got very, very busy.  
11 When they got busy, they had meetings. They wanted to  
12 put extra scrutiny on him just because he had a  
13 prosthetic left hand. During these meetings, we are  
14 going to show you they had a blizzard of paper, even  
15 before he got there to the -- when he got to the  
16 Training Academy.

17 We will show you that at the time Justin  
18 arrived at the Training Academy with the trainers, he  
19 was just as qualified then as when the FBI had  
20 determined he was qualified and deemed him fit for duty  
21 and hired him as a special agent.

22 You will find in this case and we will prove  
23 that Justin Slaby is better qualified than many of the  
24 agents in the field who have lost one hand, lost the  
25 ability to use a hand, have severe hypertension,



1 history of heart attack, seizure disorder, all kinds  
2 cardiac situations. I say that because qualified  
3 means -- and Judge Trenga shared this with you -- able  
4 to perform the essential functions of the job.

5 But Justin Slaby's qualities and  
6 qualifications are such that the Army in which he  
7 served those three tours, they asked him back for a  
8 fourth tour. But for his wife and small children, he  
9 would have taken that fourth tour and served his  
10 country in that way. But he wanted to serve in the FBI  
11 and was hired by the FBI.

12 Now, you are going hear many witnesses in  
13 this case. You will hear in a moment that this case is  
14 really about two FBIs. You'll hear about the war  
15 within itself at the FBI between the Training Division  
16 and between the fitness-for-duty people.

17 But you'll hear Chuck Pierce. Unlike any of  
18 these trainers who made the decision to remove Justin  
19 Slaby after only 6 out of 21 weeks of the Training  
20 Division, Chuck Pierce, the head of firearms training  
21 at the elite Hostage Rescue Team of the FBI, has worked  
22 with Justin Slaby on a daily basis. Because after they  
23 demoted him from special agent and removed him from his  
24 special agent job, he is now a support person with the  
25 Hostage Rescue Team. You are going to hear Chuck

1 Pierce tell you about his skills and how important that  
2 he be evaluated on his skills and not prejudged on  
3 speculation before people even met him.

4           You will also hear how Justin got to that  
5 point, how he ended up being removed. That is because  
6 the FBI trainers, when they got there, they had two  
7 choices. They had already decided that they were going  
8 to get lawyers, and they did get lawyers before he ever  
9 got there. They had decided he was going to have  
10 problems and had all kind of questions. But what they  
11 did -- what they had a choice to do, they took the  
12 position from the very beginning, aha, you have  
13 something wrong with your left hand. You have to be  
14 able to shoot well with your weak hand, your left hand.

15           Granted, his good, strong hand that he used  
16 in Iraq and Afghanistan is the hand he's always used,  
17 and there is nothing wrong with his hand.

18           In a moment, I'll tell you his right-hand  
19 shooting is better now than before the injury. But for  
20 what we need to know now, what he asked him to do, Let  
21 me be trained like everybody else. I'll take every  
22 shot you'll make two people with two regular hands  
23 take. I'll shoot with my left hand. I'll shoot with  
24 my right hand.

25           You will find repeatedly not once would they

1 let him on the range with his left hand to prove he  
2 could shoot with it. Not once. And if they didn't  
3 want him to shoot with his left hand, the evidence is  
4 going to show you the choice they had, treat him like  
5 these other agents who can't shoot with their left  
6 hand. There is plenty of those.

7           You're going to hear from a couple of them.  
8 They can't shoot with their left hand, but they go  
9 through firearms and they serve America every day. A  
10 different standard was applied to Justin Slaby.

11           You're going to hear that during the training  
12 before they ran him off, his classmates mishandled  
13 weapons. They had lethal force errors, numerous lethal  
14 force errors. What happened to them? They graduated.  
15 He never has had a lethal force error. He never has  
16 put anybody at risk of injury in his entire life. His  
17 role as a soldier and as a special agent would be to  
18 take people away from injury, to take them away from  
19 here, to prevent injury.

20           The evidence is going to show, though, two  
21 FBIs. One is the good FBI who hired him after this  
22 year-and-a-half fitness-for-duty examination, which  
23 Dr. Yoder will tell you today that he is as qualified  
24 when the trainers removed him as he was when he got  
25 there. And he sticks by his guns that he was qualified

1 and fit for duty.

2           You're also going to find that the other FBI  
3 trainers, however, did something completely different.  
4 When they first heard Justin was coming, what they did  
5 -- who did they reach out to first? Not to Justin when  
6 they heard he had a prosthetic left land. They hired  
7 lawyers. They hired lawyers before they ever met him.  
8 They hired lawyers and anticipated -- they anticipated  
9 a suit by a man they were going to make force to file  
10 it. They lawyered up for the case that they were  
11 forcing to be brought because they wanted him out of  
12 the Training Academy.

13           You are going to hear from Judge Trenga later  
14 in the week about accommodations. You are going to  
15 hear that before Justin ever got there, there was a  
16 meeting around a table, 10 or 15 people. Multiple  
17 people will tell you about it. Ms. Hoffman, who is  
18 supposed to be the expert on people with disabilities,  
19 she tells every trainer around that table, and I quote,  
20 You may not suggest accommodations to him, being Justin  
21 Slaby.

22           Can you imagine an executive person coming  
23 into the training room before he gets there and says,  
24 You will not suggest any accommodations to him at all?  
25 You see, when agencies, instead of protecting the

1 rights of people to be judged on their abilities and  
2 not on the basis of assumptions, she would never have  
3 told them that.

4           The facts are going to show you that the FBI  
5 didn't just deprive itself of one of the most qualified  
6 special agents they had ever hired, they sacrificed  
7 some principles, the principles of adherence to the  
8 law. Because, as Judge Trenga just shared with you,  
9 employers have a duty to make accommodations where they  
10 are necessary. You will hear repeatedly in this case,  
11 Justin didn't think he needed an accommodation. The  
12 people who hired him at the FBI who found him fit for  
13 duty didn't think he needed an accommodation. But the  
14 trainers did.

15           So when he says, how about you just let me  
16 shoot with the rest of my class, they said no. They  
17 ran him through a whole bunch of assessments by  
18 himself, assessments they told him were to help him:  
19 We are going to help you get through the 21 weeks. We  
20 are going to show you what you have to prove. This is  
21 not pass/fail. It will not be used against you. It is  
22 for one purpose and one purpose only, to help you later  
23 in the curricula so you can succeed.

24           You may hear in this courtroom from my  
25 friends over to the left that those assessments were

1 used against him, that those assessments were actually  
2 going to be used in front of you to justify removing  
3 him. You will find each witness when they take the  
4 stand: Why did you remove him six weeks into the 21  
5 weeks when he had not failed anything? He was a good  
6 marksman. He was great at firearms. Why did you  
7 take --

8 Oh, we just had a concern over his left-hand  
9 shooting.

10 Well, you wouldn't let him do it.

11 Oh, yes, we think he is unsafe.

12 But you wouldn't let him try it.

13 No, we wouldn't. We weren't going to let him  
14 try it.

15 That's exactly what you have here.

16 So how did they do this? And I want you to  
17 count during this trial how many times either witnesses  
18 or the lawyers for the FBI tell you all of this: We  
19 were only trying to help him. The assessments were  
20 supposed to help him. We weren't going to hold them  
21 against him. It was just going to help him get ready.  
22 That we were trying to help him by kicking him out of  
23 the Training Academy by sending him to a medical  
24 recycle.

25 But you'll find in the evidence the FBI has

1 rules and regulations. You'll get them. There are  
2 only three ways under the FBI's regulations special  
3 agents can be removed once they are in the academy:

4           Suitability, that is, honesty. People steal,  
5 insubordinate. That's suitability. They can get run  
6 off for that. They are going to tell you Justin Slaby  
7 was suitable. That wasn't an issue.

8           There's another section in here called  
9 proficiency. That is when you fail exams, when you  
10 drop your guns, you can't get past the segments.  
11 There's a method in here where they actually can remove  
12 people for proficiency problems. They didn't remove  
13 Justin Slaby from the academy for proficiency problems  
14 either. They called it a medical recycle.

15           You'll find when you read this and when the  
16 witnesses tell you about it, it is for people who have  
17 a temporary injury, that they can come back and get  
18 back into the academy. You'll find that when the  
19 trainers decided to remove this man on the basis of  
20 medical recycling, the fitness-for-duty people said no.  
21 The doctors objected.

22           The doctor said, You cannot do this. He is  
23 as fit today as when we declared him fit. You will  
24 have to find some other way to get him out of the  
25 academy. Yet, the trainers insisted, overruled the

1 doctors, and managed to get approval from somebody to  
2 remove him from the academy even though everybody who  
3 will testify will admit it was improper and absolutely  
4 against this training regulation to call this man a  
5 medical recycle. He has got a left hand. He doesn't  
6 have a temporary injury. He is able to do the job now.

7           So instead of making successful a man who  
8 already was successful, the FBI tried to block at every  
9 stage his attempt to show that success.

10           And I say that for this reason: When they  
11 kicked him out six weeks into the course, they told  
12 him, You're out. But they brought him back one time,  
13 and what they told him then you may hear. Depending on  
14 what the judge does in terms of the evidence, you may  
15 hear they told him, If you can do everything all the  
16 other trainees get taught in their 21-week course  
17 before you are taught, we might let you back in.

18           But the decision had been made he was  
19 removed. So when he had not been taught anything, when  
20 they brought him back, he did prove what they said he  
21 couldn't do.

22           Mike, if you could show the notation when  
23 they removed him in March.

24           In March, this is what they wrote down as the  
25 justification to remove him: Unable to complete



1 one-hand shooting because he could not aim and fire the  
2 pistol when held with only his left hand.

3 I don't know how to say this in any other way  
4 but to tell you that was a lie. You will hear even  
5 from FBI witnesses that they did not let him shoot left  
6 handed. He asked to shoot left handed. They told him,  
7 You will not shoot with your left hand. You will shoot  
8 only with your right hand. And that afternoon they  
9 forced him out because they wrote that down.

10 Unfortunately for them, later on when they  
11 looked at him again, they -- I won't say accidentally  
12 but at one point, they admitted, yes, he can shoot with  
13 his left hand. And there you see it. He demonstrated  
14 the ability to safely fire the weapon when controlled  
15 by his prosthetic left hand. And that's the truth. He  
16 can do that.

17 Well, what we have, though, is a catch-22,  
18 pure and simple. They wouldn't let him on the range to  
19 fire and said he was unsafe. He said, Let me try it.

20 They said, No, we won't let you. Then they  
21 say he's unsafe. That's the catch-22.

22 So for the first time in the history of the  
23 FBI you'll hear in this case, as we move toward the  
24 finish, for the first time, they claim that left-hand  
25 shooting is an essential function of the job.

1           And Judge Trenga is going to tell you to use  
2 your common sense and give you some factors. Essential  
3 functions are the ones that are written down.  
4 Essential functions are the ones people do. Essential  
5 functions, you determine that by how often it's done.  
6 Is it done in the real world? Are other special agents  
7 doing it? Are past special agents doing it?

8           You are going to find in this case, there is  
9 not a single document in this entire full of boxes in  
10 this courtroom that says shooting with your weak hand  
11 is an essential function. But you will find in a  
12 600-page report that the FBI compiled of what is not an  
13 essential function. And you know what's not in there?  
14 Left-hand shooting. I mean -- excuse me. Indulgence  
15 to my left-handed friends -- weak-hand shooting because  
16 I'm right-handed. So not anywhere in those  
17 documentations do you find that. That is just what we  
18 had.

19           But we did ask this question: Well, tell us:  
20 Does this ever happen in the real world where people  
21 are actually shooting a gun with their weak hand? And  
22 late in the game here come records. The FBI dug up the  
23 only times in the history of this agency when people  
24 are actually shooting a gun with their left hand alone  
25 by itself.

1           Seven of them. In not a single one of the  
2 seven did anything good happen. They were accidental  
3 shootings. And the lesson learned was don't have the  
4 gun in your weak hand. It's a sympathetic reflex. The  
5 chief firearms trainer in Cleveland, Ohio, wrote in the  
6 lessons learned, If I had my gun in my strong hand,  
7 this accident where the bullet went through the wall  
8 would never have happened. Another special agent with  
9 the gun in his weak hand shot off part of his strong  
10 hand because he was holding the weapon in the weak  
11 hand.

12           You see this, and we think the evidence is  
13 going to show you that weak-hand shooting is not an  
14 essential function. It is a dangerous one, and it is  
15 not done. And the only time it is done, no good comes  
16 of it.

17           You'll hear from the witness from the  
18 Shooting Incident Response Group, and you'll hear him  
19 say -- is that good or bad when they're putting the gun  
20 in their weak hand? And you'll hear him say that's  
21 bad.

22           You'll find in this case that there are three  
23 fictions. One is that left-hand shooting is an  
24 essential function. It's not under the law. Under the  
25 law that Judge Trenga gives you, the evidence is going

1 to show not a single witness from this side of the  
2 table -- and they are going to bring you some, and we  
3 are going to call some -- none of them have ever shot  
4 with their weak hand in the line of duty. So those  
5 seven times it has happened wasn't good, but the folks  
6 who are going to testify have never done it.

7           The second fiction in this case is that  
8 Justin can't shoot with his left hand. He can shoot  
9 with his left hand. He asked to do it many times, and  
10 they would not allow him to. He is able to do it, and  
11 he will show you exactly how he is able to do it.

12           Does he prefer, like most agents, to use  
13 their best hand when they are shooting one hand? Of  
14 course he does, and he is an expert marksman. But I  
15 want to tell you one other thing that I learned in this  
16 case and that you will learn perhaps: When we see a  
17 person who has lost part of a hand because of their  
18 service, you think how tragic.

19           But you are going to hear in this courtroom  
20 that tragedy sometimes brings odd advantages. And here  
21 is the advantage he got by his prosthesis. Would he  
22 rather not have had that explosion? Yes. He would  
23 never wish that to happen again. But he learned he is  
24 a better defender in combat with that hand than his  
25 previous left hand.

1           And the other thing he learned, even though  
2 he was an expert marksman as an Army Ranger, he is a  
3 better firearms shooter today. Because he has a  
4 prosthetic left hand instead of the hand he used to  
5 have, he doesn't suffer recoil. Guns -- I'm no expert  
6 in firearms. They don't have any either, by the way.  
7 But guns have recoil. And that is not an expert term.  
8 I understand guns blow back, and the second shot is not  
9 so accurate. You will hear Justin say now that he has  
10 that prosthetic left hand, when he's using his strong,  
11 able right hand, he is a better firearm shooter today  
12 than before the injury. But the FBI did not care about  
13 that.

14           The third fiction, as I move to the close, is  
15 this: That they were trying to help him. They will  
16 say, We wanted him to come back. We recycled him for  
17 his own good. You will even have some of their  
18 witnesses saying it was Justin's idea to leave the  
19 academy. You'll be the judge of the truthfulness of  
20 that testimony. But what I can tell you is the  
21 evidence is going to establish that when they hired  
22 lawyers and doctored up papers to remove him and then  
23 defrauded him into doing these demonstrations and then  
24 using them against him after they promised him that  
25 they would not -- you will see in this courtroom

1 whether they honor the promise they made to him or  
2 whether they will try to use those demonstrations  
3 against him to say, Well, he might have failed if we  
4 had left him in the class.

5 Our answer, which you will find in the  
6 evidence, is if you wanted to see how he could do, let  
7 him serve with his classmates. Let him graduate to the  
8 finish. If he passes the test, pass him. If you don't  
9 like the way he did the test, fail him. But don't  
10 remove him in the middle of the class.

11 They would not allow him to demonstrate that.  
12 So you will decide whether -- and count the number of  
13 times they say they were trying to help him. They can  
14 tell that to the family who lost more than 25 percent  
15 of their family income because of his demotion from  
16 special agent down to support staff.

17 Now, finally, I want to share with you the  
18 order of the witnesses just for a moment before I sit  
19 down and turn the floor over to my adversary,  
20 Mr. Mikolashek over here.

21 You're going to hear first from the man who  
22 decided Justin Slaby was qualified and fit for duty and  
23 that he was not a direct threat to anyone. That's  
24 Dr. Yoder. Dr. Jim Yoder, you will hear, I have  
25 probably spoken with him five or six times. He is

1 going to tell you why he declared him fit for duty and  
2 why he never changed his mind.

3           We are going to follow that with some of the  
4 training people, why they decided to try to overrule  
5 the doctors and try to start this fight within the FBI  
6 of whether they could remove him or not. But the  
7 doctors did not give up on him. Dr. Yoder, Dr. Fabbri,  
8 you will see their -- you will hear the testimony.  
9 They were absolutely opposed to this because he was fit  
10 for duty. They knew he was fit for duty. They  
11 determined him fit for duty, and nothing had changed.

12           But you are going to hear those special  
13 agents, both the executive managers of the training  
14 division and those they say were the ones who  
15 participated. In other words, there's two people we're  
16 going to put on the stand. Ms. Moyet-Treretola and  
17 Mr. Delaney they claim to be the decision makers, but  
18 they claim not to know anything about Justin Slaby.  
19 They claim they relied on their -- they called them  
20 subject matter experts but they're not experts. They  
21 will not be experts in this trial.

22           But when we talked to those, quote, people,  
23 they say we didn't know they were going to kick him  
24 out. We thought we were helping him. We thought we  
25 were trying to get him ready for week 18. We didn't

1 know they were going to pull the plug on him in week 7.  
2 Don't blame us for this. Talk to executive management.  
3 You will hear that that's what they say.

4           You're also going to hear from Mark Crider  
5 and from Mr. Pierce. Mr. Pierce, who works with Justin  
6 today at the elite Hostage Rescue Team. Mr. Crider's  
7 one of the two special agents who eyewitnessed part of  
8 the fitness-for-duty exam.

9           You're going to hear in one of the best  
10 evidence of bias in this case is what happened to those  
11 two men. Because Mr. Pierce demanded to be at some of  
12 these, quote, demonstrations assessments, the trainer  
13 said, You will not -- you will not help him. You will  
14 not try to suggest any accommodations to him. We won't  
15 even allow you to be there to observe it. He wanted to  
16 be there because he believed him.

17           You will hear Mr. Pierce tell you from that  
18 stand, as an FBI trainer, Hostage Rescue Team boss,  
19 that the Training Division let him down. He should  
20 have been allowed to succeed instead of pushed down by  
21 prejudice.

22           Mr. Crider, he did support this application  
23 by eyewitnessing the demonstration of shooting, not  
24 live shooting, but shooting. And when he did that, you  
25 will find that he got called into the office and got



1 the third degree. You'll hear him tell how when he got  
2 back to Milwaukee, he was called into his SAC's office  
3 and given the third degree for his role, even for  
4 having lunch with Justin Slaby at the Training Academy.

5 He was given the third degree and accused of  
6 trying to help him. That's what they said to Mark  
7 Crider: You shouldn't be trying to train him. What  
8 are you doing training him? Because you will see in  
9 the memos they wanted to limit the number of people who  
10 could help him.

11 They'll tell you: We didn't want to treat  
12 him any better than anybody else, a man they had  
13 already removed from the academy where he was not being  
14 trained with his classmates.

15 So at the end of the case, you are going to  
16 get three questions, at least, in the case. When you  
17 hear from the witnesses -- and yes, you will hear from  
18 Mr. Crider and Mr. Pierce. You will hear from FBI  
19 people who made these decisions. You will also hear  
20 from Jennifer and Justin Slaby, who will tell you what  
21 they have endured, who will tell you he is not a man  
22 who likes to talk about himself because he is not a  
23 very talkative person. But he is going to share with  
24 you his experience.

25 At the end of the day, we think the evidence

1 is going to show he was well more than qualified and  
2 that the FBI fitness-for-duty people were exactly right  
3 when they hired him for this job.

4           Finally, you will be asked a question about  
5 how to make this right. In other words, Judge Trenga  
6 will ask you questions about whether Justin was  
7 qualified, whether they proved he was a direct threat,  
8 whether it would have been an unreasonable  
9 accommodation to allow him to be trained like everybody  
10 else or whether it would have been a reasonable  
11 accommodation to treat him like the other people who  
12 have hand problems, even though he didn't need it. He  
13 can shoot with his left hand.

14           But if they thought he did need an  
15 accommodation, you will get asked a question about  
16 that. But at the end of the day, you will be asked to  
17 decide what it takes to put this family back to where  
18 they would have been had this not happened. And that's  
19 a difficult question to answer, but you'll hear the  
20 evidence. You'll hear what the FBI has to say on that.

21           You will decide whether or not he was  
22 qualified and whether his hand was why they removed him  
23 from the Training Academy, and you will get to answer  
24 whether they can prove that he was a direct threat to  
25 people. And at the end, you will decide what is to be

1 paid back, what was lost, what was taken from this  
2 family in this long journey to get where we are today.

3 At the end of the case, we will all thank you  
4 again, but it is our belief that the evidence that we  
5 present to you will allow you to make the right verdict  
6 for you, for the public, for the FBI, both the good FBI  
7 and the trainers who decided to remove him better. If  
8 we do that, we can all be proud of the work we do in  
9 this courtroom this week and perhaps early next week.

10 We very much look forward to putting our  
11 first witness on later this afternoon. So thank you  
12 again for your service to our country in serving as a  
13 juror in this case.

14 Thank you, Judge.

15 THE COURT: Thank you, Mr. Griffin.

16 Mr. Mikolashek -- Ms. Bae.

17 OPENING STATEMENT

18 MS. BAE: Good afternoon. My name is Sosun  
19 Bae, and I represent the FBI on behalf of the U.S.  
20 Attorney's Office. With me this afternoon are my  
21 colleagues, Kevin Mikolashek, Bernard Kim, and Lauren  
22 Wetzler, also from the U.S. Attorney's office, as well  
23 as Matthew Rizzo, FBI Assistant General Counsel, and  
24 Julie Johnson of the FBI's Training Division. Special  
25 Agent Johnson is not a witness in this case but a

1 current section chief at the Training Division. Also  
2 with us is Tabitha Fuelling, who will be helping out  
3 with technology matters.

4           It is the mission of the FBI to protect this  
5 country and its citizens. It is the unique duty of the  
6 FBI special agents to carry out this mission, and this  
7 is what the case boils down to: One simple idea with  
8 which you are all familiar, the idea of duty.

9           You will hear from the plaintiff, Justin  
10 Slaby, and his attorneys about Mr. Slaby's strong sense  
11 of duty to our nation. No one contests that. But the  
12 duty of the FBI is to protect this country and all of  
13 its citizens, and that duty includes protecting the  
14 safety of its own agents.

15           It is the ultimate responsibility of the  
16 FBI's Training Division to ensure that every single  
17 trainee who enters the FBI Academy can safely and  
18 effectively perform all the skills that the academy has  
19 deemed essential to fulfilling an agent's duties before  
20 that trainee graduates from the FBI Academy and becomes  
21 a special agent.

22           You will hear testimony that the reason new  
23 agent trainees must be able to accomplish all the tests  
24 that the Training Division has deemed essential is  
25 because all special agents must be capable of

1 performing every one of those functions no matter what  
2 specific field or division they end up in. This is  
3 because when trainees are at the academy, they don't  
4 know where they are going when they leave or exactly  
5 what they will be doing.

6           The evidence will also show that sometimes  
7 events arise that call for all hands on deck, and every  
8 agent in the region, regardless of whether the agent  
9 works gangs or white collar or Internet fraud, must be  
10 available and capable of fully participating in  
11 whatever way the situation calls for.

12           Over the next few days, the evidence will  
13 show that the plaintiff, while possessing many  
14 admirable qualities that led the FBI to give him the  
15 opportunity to enter the academy in the first place,  
16 simply could not meet the very same standards that  
17 every single member of his training class and, for that  
18 matter, every single trainee that has come through  
19 Quantico in modern memory is required to meet in order  
20 to graduate and become a special agent.

21           Specifically and most significantly, you will  
22 hear from witnesses, including Nate Williams of the  
23 academy's Firearms Training Unit, that Mr. Slaby could  
24 not safely and in accordance with the long-established  
25 standards handle a firearm with each hand individually.

1 You will hear from Agent Williams and others  
2 specifically why the ability to safely and effectively  
3 handle a firearm with each hand is essential.

4 Now, you may hear throughout the course of  
5 this trial the parties and witnesses refer to the  
6 dominant hand or the offhand or the weak hand, but  
7 don't get confused. They all mean the same thing. And  
8 you may hear the parties and witnesses refer to the  
9 academy or Training Division or Quantico, and those all  
10 mean the same thing too.

11 The bottom line, ladies and gentlemen, is  
12 that the evidence will show that Mr. Slaby simply could  
13 not accomplish several of these essential functions  
14 required by the Training Academy, including the ability  
15 to safely and effectively handle a weapon with his  
16 nondominant hand, and that all new agent trainees are  
17 required to accomplish those very same functions in  
18 order to graduate.

19 And you may hear plaintiff's attorney say,  
20 Well, didn't the FBI have a duty not to discriminate  
21 against Mr. Slaby? Of course it did. But what you  
22 will not see or hear is any actual evidence that the  
23 FBI even harbored any discriminatory feelings toward  
24 him, much less actually acted in a discriminatory way  
25 toward him.

1           What you will hear is testimony from Training  
2 Division witnesses, like Diana Moyet-Treretola and  
3 Timothy Delaney, that they were actually excited for  
4 the arrival of Mr. Slaby to Quantico.

5           What you will see are the efforts that the  
6 FBI took to make sure it complied with the law once it  
7 knew a disabled trainee was coming to the academy.

8           What you will see is that to the extent that  
9 the FBI treated him at all differently from the other  
10 students, that they actually treated him more favorably  
11 than the other trainees. What will become clear in the  
12 next few days is that the FBI wanted Mr. Slaby to  
13 succeed. Now, Mr. Griffin called it a fiction that the  
14 FBI was on Mr. Slaby's side and wanted him to succeed,  
15 but you will see that it is actually fact.

16           Mr. Slaby's lawyers may also say, Well,  
17 didn't the FBI have a duty to give Mr. Slaby a fair  
18 shake? Again, you will not see or hear any evidence  
19 that the FBI did not give Mr. Slaby a fair chance.  
20 Instead, you will see that the FBI went far and above  
21 its obligations and maximized its efforts within the  
22 scope of its rules in order to give Mr. Slaby his best  
23 chance for success.

24           You will also see that the FBI valued  
25 Mr. Slaby enough to offer him a professional nonagent

1 position with the prestigious Hostage Rescue Team after  
2 Mr. Slaby left the training program, a job which he  
3 still holds with the FBI today.

4           You will see that even to this day, the FBI  
5 is giving Mr. Slaby the option to return to the academy  
6 if prosthetics technology evolves enough to allow him  
7 to demonstrate that he can perform the essential  
8 functions.

9           Now, you may notice that most of the  
10 witnesses in this case will be called by the plaintiff.  
11 Because the plaintiff has the burden of actually  
12 proving his claim to you, he has the right and the  
13 obligation to go first.

14           Just remember this: Because they are the  
15 ones who put the witness on the stand does not mean  
16 that what the witness says will help them. Many of the  
17 witnesses that will be called by the plaintiff are also  
18 witnesses for the FBI, and we will make our case to you  
19 from the very first witness that they call to the very  
20 last witness that we call.

21           We will see the story of Justin Slaby and the  
22 FBI unfold in three stages:

23           The first stage predates Mr. Slaby's arrival  
24 at Quantico and will show you how Mr. Slaby made it to  
25 the academy, as well as the Training Division's



1 positive reaction to Mr. Slaby's entry as the first  
2 ever new agent trainee with a prosthetic hand.

3           The second stage will show evidence of his  
4 time at the academy in Quantico, how the FBI not only  
5 didn't discriminate against him but actually gave him  
6 the tools to try to succeed.

7           The third stage will show the circumstances  
8 of Mr. Slaby's leaving the academy and how the FBI made  
9 the effort to place Mr. Slaby, a highly valued  
10 employee, in a professional position within the FBI at  
11 the location and unit of Mr. Slaby's choice.

12           The plaintiff will try to bring in all sorts  
13 of evidence about different people, other agents, and  
14 events that have nothing to do with Mr. Slaby or his  
15 time at the FBI Academy. So I urge you not to get  
16 distracted by all this extra information. But instead,  
17 remember that in this case it is only about Justin  
18 Slaby and how rather than discriminate against him, as  
19 the plaintiff alleges, the FBI made clear efforts to  
20 facilitate his success but in the end could not shirk  
21 its duty to the country by compromising its standards  
22 which apply to everyone for one individual.

23           So let's start by talking about what happened  
24 at the academy before Mr. Slaby's arrival. Before  
25 Mr. Slaby arrived at Quantico, you will hear testimony

1 that members of the management team at the FBI Training  
2 Division were excited at the prospect of the first ever  
3 new agent trainee to enter with a prosthetic hand and  
4 that they looked forward to seeing what Mr. Slaby could  
5 do with his prosthesis.

6           To be sure -- the FBI had some concerns since  
7 this was the first person with a prosthetic hand to  
8 enter the academy, but the FBI's doctors noted those  
9 concerns and prepared for them in the hopes that  
10 Mr. Slaby would succeed. And because they knew a  
11 trainee with a prosthesis was going to be coming to  
12 Quantico, the Training Division, in light of this new  
13 situation they had not encountered before, held a  
14 meeting to ensure that the academy was prepared to  
15 address the reasonable accommodations that Mr. Slaby  
16 might request. In short, the FBI held a meeting to  
17 make sure that it complied with the disability laws.

18           Mr. Slaby's attorneys may tout the fact that  
19 he passed a functional capacity test in Milwaukee  
20 before he entered the academy. But when the plaintiff  
21 shows you that an FBI doctor named Dr. Yoder declared  
22 Mr. Slaby fit for duty, Dr. Yoder himself will tell you  
23 that fit for duty does not mean that Mr. Slaby could  
24 adequately perform the essential functions, but only  
25 that there was a determination that he should have the

1 opportunity to demonstrate that he could perform these  
2 essential tasks. We will show you that once Mr. Slaby  
3 arrived at Quantico, the academy made concerted efforts  
4 to give him just that opportunity.

5           Now we'll move on to the second stage,  
6 Quantico. When we talk about Mr. Slaby's time at the  
7 academy, you will hear testimony about different units  
8 in the Training Division, and three in particular, the  
9 Firearms Training Unit; the Physical Training Unit,  
10 which includes defensive tactics; and the Practical  
11 Applications Unit.

12           The Firearms Training Unit teaches new agent  
13 trainees how to handle and shoot the various weapons  
14 they may be required to use as a special agent. The  
15 defensive tactics part of the instruction teaches  
16 trainees, among other things, how to defend themselves  
17 when they need to and how to apprehend suspects who  
18 might resist them. The Practical Applications Unit  
19 puts all of that other training together and includes  
20 instructions on how to plan and execute raids and how  
21 to search and clear rooms.

22           You will hear that a few days after Mr. Slaby  
23 arrived at the FBI Academy, the Training Division gave  
24 him the opportunity to watch and try out the essential  
25 tasks that he would be expected to safely and

1 effectively perform before graduating from the academy  
2 and becoming a special agent.

3           When you look at the documents describing the  
4 assessment for yourselves, you will see clearly that  
5 they are labeled safety assessments and preview of  
6 skills. And indeed, safety and the chance to preview  
7 the essential skills are the very reasons the FBI gave  
8 Mr. Slaby the opportunity to have these nonmandatory,  
9 nongraded sessions.

10           Multiple witnesses will testify that  
11 Mr. Slaby was given the rare advantage through this  
12 preview of skills to look down the road and know weeks  
13 ahead of time exactly what skills he would be required  
14 to perform and to learn the proper techniques for how  
15 to accomplish them.

16           You will also hear testimony that Mr. Slaby  
17 was given the opportunity to suggest reasonable  
18 accommodations and find alternative ways for  
19 accomplishing such tasks if he could not perform them  
20 in the traditional way due to his prosthetic hand. In  
21 other words, he was given the opportunity to suggest  
22 ways he might effectively perform some of the skills  
23 differently than the standard way without jeopardizing  
24 the safety of himself or others or altering the  
25 fundamental point of that skill.

1           The evidence will show that Mr. Slaby  
2 interacted extensively with the instructors during  
3 these sessions to come up with several reasonable  
4 accommodation requests, many of which were granted by  
5 the Training Division because they were safe and did  
6 not fundamentally alter the FBI's ability to carry out  
7 its mission.

8           In addition to the opportunity to preview the  
9 essential skills he would need to perform in class, the  
10 other reason for these assessments, as shown by the  
11 very titles of these documents, were so that the  
12 instructors and management at Quantico could determine  
13 whether Mr. Slaby posed a safety hazard to himself or  
14 those around him when he was performing these tasks.  
15 Safety is a critical part of the FBI's mission, and the  
16 academy needed to know that Mr. Slaby could perform his  
17 duties without unnecessarily endangering himself or  
18 others.

19           You will hear testimony from Diana  
20 Moyet-Treretola of the Training Division that at the  
21 time these safety assessments occurred, Mr. Slaby was  
22 actually relieved that the FBI had taken proactive  
23 steps on his behalf.

24           And Ray Flannagan, an instructor who  
25 administered some of the safety assessments, will

1 testify that Mr. Slaby was engaged in the process of  
2 collaborating with the instructors on possible  
3 reasonable accommodations. And even though he could  
4 not safely or effectively perform several of the skills  
5 during this preview, even though Mr. Slaby himself  
6 admitted that he was unable to fire a weapon with his  
7 prosthetic hand, the FBI Training Division still gave  
8 him the chance to continue through the program for  
9 several more weeks until he reached the point in the  
10 curriculum where he, along with all the other students,  
11 was required to fire the weapon safely and effectively  
12 with his left hand and could not do it.

13           Now, at that point, the FBI could simply have  
14 brought Mr. Slaby in front of a panel for trainees who  
15 could not meet the academy's requirements, the New  
16 Agent Review Board or NARB for short, in order to  
17 disqualify him from the training program altogether.  
18 Instead, the FBI gave him the best opportunity it could  
19 for future success by labeling Mr. Slaby's removal as a  
20 medical recycle, which essentially gave him the chance  
21 to come back to the academy if he could modify his  
22 prosthesis enough that he could demonstrate that he was  
23 able to safely and effectively perform the essential  
24 tasks set out by the academy.

25           Rather than sending Mr. Slaby back to the

1 Milwaukee office during his medical recycle, which is  
2 the standard practice because it was his originating  
3 office, Mr. Slaby's class counselor, Melinda Casey,  
4 will show you that the FBI allowed him to stay in this  
5 local area so that he would have access to the best  
6 prosthetics experts and the most state-of-the-art  
7 prosthetics in the country.

8               Now, after a few weeks, you will hear that  
9 Mr. Slaby attempted to return to the New Agents  
10 Training Program with a modified prosthesis. This new  
11 prosthesis or modified prosthesis had what could be  
12 called a trigger finger or a mechanical digit on it  
13 which Mr. Slaby hoped would allow him to pull the  
14 trigger of a firearm with his prosthetic hand.

15               Because Mr. Slaby wanted to come back to the  
16 training program, he was required to demonstrate that  
17 he would be able to safely and effectively shoot a  
18 firearm with his nondominant hand because he had been  
19 unable to do so with the earlier version of his  
20 prosthesis.

21               So the Training Division administered the  
22 safety assessments again, this time with an eye toward  
23 letting him back into the program if he could be safe  
24 and effective. With this modified prosthesis, Mr. Slaby  
25 could technically pull the trigger of a firearm with

1 his prosthetic hand. But as multiple witnesses and  
2 common sense will tell you, the ability to pull the  
3 trigger is not the same as the ability to safely and  
4 effectively handle a weapon, which also includes the  
5 capacity to transition the weapon from one hand to the  
6 other and to pick up the gun with one hand in case the  
7 other one becomes incapacitated.

8           The firearms instructors, who have the duty  
9 to implement the FBI's firearm standards, determined  
10 that Mr. Slaby could not safely and effectively handle  
11 the firearm.

12           Mr. Slaby's modified trigger finger  
13 prosthesis also presented safety issues to those around  
14 him. Ray Flannagan and Diana Moyet-Treretola will both  
15 testify that Mr. Slaby inadvertently scratched the face  
16 of an instructor with his mechanical digit right near  
17 the eye during a close-contact exercise.

18           You will also hear that Mr. Slaby, in the  
19 course of demonstrating the skill of disarming someone,  
20 got his prosthetic digit caught in the trigger area of  
21 an unloaded gun he was trying to take from the person  
22 playing the suspect.

23           Because Mr. Slaby could not demonstrate he  
24 could safely and effectively perform the essential  
25 tasks of shooting a firearm with his nondominant hand



1 and because the instructors determined other safety  
2 issues with a trigger finger prosthesis, the FBI could  
3 not violate its own standards and let him back into the  
4 academy.

5           Now, again, at this point, the FBI could have  
6 brought Mr. Slaby in front of NARB and disqualified  
7 him. But instead, they kept the door open for him to  
8 return to the new agent program one day by keeping him  
9 in medical recycle status.

10           And further, you will see documents and hear  
11 testimony showing the FBI not only kept him on as an  
12 employee but valued his skills and his dedication  
13 enough to secure him a rewarding and challenging job  
14 that he wanted, which is a professional nonagent  
15 position with the Hostage Rescue Team in this local  
16 area where he wanted to stay. Mr. Slaby presently  
17 still holds this position with the FBI's prestigious  
18 Hostage Rescue Team. Contrary to what plaintiff's  
19 lawyers might represent, Mr. Slaby has not been chased  
20 out by the FBI but remains a valued employee.

21           Most importantly, the FBI has ensured that  
22 the door is still open to Mr. Slaby being able to  
23 return to the academy and trying to become an agent if  
24 technology evolves to the point that he can safely  
25 perform the special agent essential tasks and, in doing

1 so, be able to effectively carry out the FBI's mission.

2           Now, the other side, as you may have noticed  
3 in their opening, plans to shower you with a lot of  
4 documents and get testimony from witnesses on topics  
5 which may make you scratch your head as to what they  
6 could possibly have to do with this case. They may  
7 show you a list with the phrase essential tasks across  
8 the top which has a bunch of tasks listed on it and  
9 then point to the fact that nondominant shooting is not  
10 specifically mentioned on that list.

11           But our witnesses will show you that this  
12 list is not an FBI training document and that it is the  
13 FBI's Training Division who holds the responsibility  
14 for determining what standards new agent trainees must  
15 meet in order to graduate and fulfill their duties as  
16 agents. The evidence will show you that  
17 nondominant-hand shooting was encompassed on the skills  
18 listed on that list of essential tasks.

19           They may also show you that a couple of  
20 special agents with injured hands were not required to  
21 shoot with those hands during some periodic firearms  
22 qualification. We will show you that those agents,  
23 unlike Mr. Slaby, are long-term, active special agents,  
24 not a trainee. And that unlike Mr. Slaby, they did not  
25 have prosthetic hands and could use their injured

1 hands. You will see these agents testify that they can  
2 and have demonstrated that they can actually shoot  
3 effectively with those injured hands alone.

4           Plaintiff's lawyers may also show you a few  
5 instances, like Mr. Griffin mentioned, where agents,  
6 while holding weapons in their nondominant hands  
7 accidentally discharged those weapons. But what you  
8 will hear is that the overwhelming majority of  
9 accidental discharges happen when the weapon is in the  
10 agent's dominant hand, not the nondominant hand.

11           So through all the witnesses, all of the  
12 documents, all of the various issues raised by the  
13 parties, I ask you to just remember these three things:  
14 One, the FBI wanted Justin Slaby to succeed; two,  
15 Mr. Slaby could not meet the standards set out by the  
16 FBI Academy, the same standards that every single other  
17 new agent trainee has to meet; and three, the FBI's  
18 duty, its mission as the nation's premier law  
19 enforcement agency, is to protect the United States and  
20 the people who live here. The FBI would not be  
21 fulfilling its duty to the citizens of this country if  
22 it were to ignore its own standards and allow anyone to  
23 become a special agent who cannot perform all of the  
24 essential tasks of that position for any reason.

25           This case is not about the fact that

1 Mr. Slaby is disabled, but rather about the fact that  
2 he could not meet the standards that every single  
3 trainee must meet in order to become an FBI special  
4 agent.

5 Thank you for your service.

6 THE COURT: Thank you, Ms. Bae.

7 Plaintiff will call its first witness.

8 MR. GRIFFIN: Your Honor, our first witness  
9 will be Dr. Jim Yoder.

10 THE COURT: Dr. Yoder, please come forward.

11 MR. GRIFFIN: I think the parties have agreed  
12 to invoke the rule as well, Your Honor.

13 THE COURT: All right. Are there any  
14 witnesses in the courtroom?

15 (No response.)

16 THE COURT: The parties will instruct their  
17 respective witnesses to remain outside of the courtroom  
18 and to not discuss their testimony before or after  
19 their testimony with any other witness in the case.

20 MS. BUTLER: Your Honor, could we approach  
21 for just a second?

22 THE COURT: Yes.

23 (Conference at the bench, as follows:)

24 MS. BUTLER: Your Honor, we had an agreement  
25 that Jennifer Slaby says she's only going to talk about

Yoder - Direct

1 his mental suffering to be excluded from the rule. So  
2 there is going to be one witness --

3 THE COURT: No objection?

4 MR. MIKOLASHEK: No, Your Honor.

5 THE COURT: Okay. That's fine.

6 MR. MIKOLASHEK: Thank you, Your Honor.

7 (Proceedings continued in open court, as follows:)

8 MR. GRIFFIN: All right to get started, Your  
9 Honor?

10 THE COURT: Please.

11 MR. GRIFFIN: Great.

12 JAMES YODER, PLAINTIFF'S WITNESS, AFFIRMED

13 DIRECT EXAMINATION

14 BY MR. GRIFFIN:

15 Q Dr. Yoder, would you please introduce yourself.

16 A My name is James Yoder. I'm a medical officer at  
17 FBI headquarters.

18 Q All right. And, Dr. Yoder, you and I have met on  
19 several occasions in the past and have been able to  
20 communicate effectively, I think. Have we not?

21 A If you say so.

22 Q Thank you for that. I appreciate that.

23 Tell the jury, if you would, how many years you  
24 have been a medical officer with the FBI.

25 A Almost 15.

Yoder - Direct

1 Q All right. And would you mind sharing with the  
2 ladies and gentlemen of the jury your description of  
3 the FBI's application process.

4 A For special agents?

5 Q Yes, sir.

6 A The applicants go through a selection process that  
7 is involved with interviews and various tests and a fit  
8 test to make sure they are physically capable of  
9 performing essential duties and the final -- when they  
10 receive what's called a conditional job offer, then  
11 they are set up to do a fitness-for-duty examination,  
12 which is where we take part in the process.

13 And so we review their ability to meet hearing and  
14 vision and other aspects of the minimum capabilities  
15 that we think are required to perform the essential  
16 duties, and then we would give them medical  
17 qualification determination. Then they would have a  
18 class date set up.

19 Q Great. Let's talk first about the application  
20 process. Because as I understand it, the FBI does not  
21 extend a conditional offer to an individual until it  
22 has already gone through an application process that  
23 takes months and sometimes years.

24 A I believe that's correct, yes.

25 Q Okay. And after the FBI decides whether or not

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1 they will offer a person a conditional offer, they will  
2 send a letter --

3 MR. GRIFFIN: And if it's all right, Your  
4 Honor, is the practice for this gentleman to have the  
5 exhibits near him so that he can examine them?

6 THE COURT: Yes.

7 MR. GRIFFIN: Then at this point, I'll ask  
8 him to make available the volume with the first parts  
9 of Exhibits 1 through whatever they are, and then we'll  
10 go through the application process.

11 BY MR. GRIFFIN:

12 Q Doctor, let me start it this way: After the  
13 months or years that the FBI takes to decide whether to  
14 make an offer to a person, at the conclusion of that  
15 process, does the FBI send a letter which is called a  
16 conditional offer?

17 A Yes, that's correct.

18 Q All right. And if you don't mind looking at  
19 Exhibit 4, I'll ask if you can identify that as the  
20 conditional offer that was extended to Justin Slaby on  
21 March 9, 2010.

22 A Looks like it is, yes, March 8, 2010.

23 Q Okay. And in other words, this is not the letter  
24 that actually hires someone as a special agent. This  
25 is just the letter that gives them a conditional offer,

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1 if I'm right.

2 A That's right. It is contingent on them passing  
3 their physical examination.

4 Q Sure. Exactly. And you read my mind. So thank  
5 you for that.

6 The conditional offer is contingent on them  
7 passing their fitness-for-duty examination and their  
8 background examination; is that right?

9 A Correct.

10 Q Okay. And your life over the last 15 years has  
11 been part of the fitness-for-duty examination process  
12 for the FBI?

13 A Yes.

14 Q Okay. Would you characterize the FBI's selection  
15 process as one that's thorough and arduous?

16 A I believe it is good, yes.

17 Q Okay. Great.

18 Let me ask you this: In terms of the  
19 fitness-for-duty process, does this take place only  
20 after a person has received a conditional offer as a  
21 special agent?

22 A Yes. The exam is scheduled after they receive  
23 that letter.

24 Q All right. And if you don't mind looking at  
25 Exhibit Number 9, page 3, I'm going to ask you a little



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1 bit about the fitness-for-duty process that you go  
2 through before you make the decision to declare a  
3 person as qualified for the job, if that's all right  
4 with you. So let me know when you are at Plaintiff's  
5 Exhibit Number 9.

6 A The page says fitness-for-duty examinations.

7 Q Great. And Exhibit 9, for the ladies and  
8 gentlemen of the jury, is this the official FBI  
9 fitness-for-duty policy implementation guide?

10 A It is.

11 Q So if you don't mind going with me to page 5.

12 MR. GRIFFIN: We have got page 5 up; do we  
13 not?

14 BY MR. GRIFFIN:

15 Q Let me just ask you this: Does page 5 determine  
16 how thorough the fitness-for-duty process is at the  
17 FBI?

18 A It tells what positions require it and how it is  
19 performed, yes.

20 Q Sure.

21 MR. GRIFFIN: And if we don't mind, if you  
22 are able, Mike, to zoom in on the second to the last  
23 paragraph of the exhibit on page 5 to share what  
24 happens at the FBI. And if you can, zoom in just a  
25 little more. That would be great. There we go.

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1 Great.

2 BY MR. GRIFFIN:

3 Q And, Dr. Yoder, is it true that the  
4 fitness-for-duty process has multilevel reviews by  
5 nurses, physicians, and health care program managers,  
6 and each applicant's medical history will be reviewed  
7 on a case-by-case basis as it pertains to the essential  
8 job functions of the position for which the person is  
9 being considered?

10 A Yes.

11 Q Okay. And the purpose of the fitness-for-duty  
12 process is to make sure on a case-by-case basis that  
13 the person is able to perform the essential functions  
14 of the job; is that right?

15 MR. KIM: Objection, leading.

16 THE COURT: All right. I'm going to sustain  
17 the objection absent some requested finding by the  
18 Court.

19 MR. GRIFFIN: I beg -- I couldn't hear you.

20 THE COURT: Absent some requested finding by  
21 the Court, I'm going to sustain the objection.

22 MR. GRIFFIN: Your Honor, I'll ask permission  
23 to lead the witness as an adverse witness.

24 THE COURT: All right. He is currently an  
25 employee of the FBI?

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1 MR. GRIFFIN: He is, Your Honor.

2 THE COURT: All right. I'll permit you some  
3 latitude.

4 MR. GRIFFIN: Thank you.

5 BY MR. GRIFFIN:

6 Q I'm just asking: Is this true in the policy  
7 implementation guide that the purpose of this is to  
8 review each person as it pertains to their ability to  
9 perform the essential functions of the job?

10 A Yes.

11 Q Okay. And in your review -- you review thousands  
12 and thousands of applicants and special agents every  
13 year for the special agent's position; do you not?

14 A On a typical year, it would vary but anywhere from  
15 700 to 2,000 would be the estimate depending upon a  
16 hiring year.

17 Q So 700 to 2,000 a year?

18 A Yes.

19 Q Okay. And that includes both applicants and  
20 incumbents?

21 A That would just be applicants. It depends on how  
22 many are hired. If we hire 700 agents, it would be  
23 twice that number, probably, exams that we would do.

24 Q Wow. For the ladies and gentlemen of the jury,  
25 for either case, whether it's an incumbent or an

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1 applicant, your job is to make sure when you are doing  
2 a fitness-for-duty examination that the person is able  
3 to perform the essential functions of the job?

4 A To the extent that an exam will do that, yes.

5 Q Yes. In other words, that's what it says in terms  
6 of why you're doing it; it's to make sure that they can  
7 perform the essential functions of the job?

8 A That's correct.

9 Q Okay. And if we look at page 3, if we might.  
10 Page 3, does it describe a visual representation of the  
11 fitness-for-duty process at the FBI?

12 A It mainly shows the positions that require it.

13 Q All right. And at the FBI, the department that  
14 makes a decision in terms of qualified or not or fit or  
15 not is the HCPU of the HRD; am I right?

16 A That's correct.

17 Q Okay. And for the ladies and gentlemen of the  
18 jury, the HCPU is the Health Care Programs Unit?

19 A Correct.

20 Q And that's part of the Human Resources Division,  
21 the HRD?

22 A It is.

23 Q All right. Good.

24 And so even though you gather information from  
25 lots of different sources, the decision that's made

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1 about whether a person is qualified and able to perform  
2 the essential functions is a decision that's made by  
3 the HCPU and you and your colleagues?

4 A That's correct.

5 Q Okay. Great.

6 Let me ask you this: Describe whether or not you  
7 feel that those decisions in terms of deciding who is  
8 fit for duty and qualified and those who are not, how  
9 seriously do you take that obligation in terms of  
10 making that determination of whether they're fit and  
11 qualified or not fit and rejected?

12 A Well, there are several levels in which we  
13 would -- most people, over 90 percent, we may need  
14 additional information. But normally, they're  
15 qualified at first look. They may need new glasses or  
16 something of that nature or additional information on  
17 an illness or injury in the past.

18 There are a number that we would call a gray zone  
19 area in which we believe there's an increased risk, but  
20 it is not sufficient to deny them an opportunity to go  
21 on to a training environment. Those get written up  
22 usually by me and approved by the chief medical  
23 officer.

24 And then there's a small number, usually 2 to  
25 4 percent, which we believe the risk is significant,

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1 and those would be recommended for denial and  
2 discontinuation of the applicant process.

3 Q Sure. And we'll get to this in a moment.

4 But in this case, in your determination of Justin  
5 Slaby, you declared him fit for duty and not a direct  
6 threat under the risk assessment you just described; am  
7 I right?

8 MR. KIM: Objection, Your Honor, leading.

9 THE COURT: Overruled.

10 A He was what we'd call one of those gray zone cases  
11 recognizing that there was an increased risk, but it  
12 wasn't sufficient to deny him an opportunity to move  
13 forward to train.

14 Q So he was declared fit for duty?

15 A He was.

16 Q Because he was not in that 2 to 4 percent risk  
17 that you just described?

18 A That's correct.

19 Q Okay. Great.

20 Do you know anybody but you at the FBI who has  
21 ever made an analysis of the relative risk of letting  
22 Justin Slaby graduate from the academy?

23 A I'm not sure I understand your question.

24 Q Maybe it wasn't a good one, and I apologize.

25 Has anybody else but you at the FBI ever done any

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1 kind of risk assessment on Justin Slaby?

2 A I don't imagine so. I think Dr. Wade, the chief  
3 medical officer, would have participated on that, but  
4 he's mainly signing off on my logic and conclusion.

5 Q Sure. In other words, Dr. Wade approved of the  
6 fitness-for-duty determination that you made that  
7 allowed Justin to actually be appointed as a special  
8 agent, right?

9 A Correct.

10 Q Okay. Fair enough.

11 In terms of the fitness-for-duty examination,  
12 describe the amount of information you gather in order  
13 to make that decision.

14 A It is what most people would know as a typical  
15 physical examination with additional areas of vision,  
16 color vision, pulmonary function, chest X-ray,  
17 electrocardiogram. And if there are special needs for  
18 issues that need to be resolved, we'd go back to the  
19 person's own specialist or physician to answer some of  
20 those questions about stability of a condition. But it  
21 is fairly thorough, yes.

22 Q Good.

23 Let me ask you: Is Exhibit Number 5 part of the  
24 fitness-for-duty file that you generated as part of  
25 your work in declaring that Justin Slaby was fit for

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1 duty?

2 A Yes, it is.

3 Q Okay. Great.

4 And for the ladies and gentlemen of the jury, you  
5 gathered not only medical information but you gathered  
6 functional information about his abilities; did you  
7 not?

8 A We did.

9 Q Okay. And if I understand the fitness-for-duty  
10 process, when a person has a potentially limiting  
11 condition that might or might not interfere with their  
12 ability to do the job, you, as a thorough examiner, dig  
13 deeper than on a person who doesn't have a potentially  
14 limiting condition like diabetes or hand injuries or  
15 seizure disorders; am I right?

16 MR. KIM: Objection, compound, Your Honor.

17 THE COURT: Overruled.

18 A Yes.

19 Q Okay. In other words, when somebody -- for  
20 Justin, for example -- we'll cut to the chase for him  
21 in a minute. But just because of the fact that he had  
22 a prosthetic left hand, you dug deeper to verify his  
23 ability in his case; did you not?

24 A Yes.

25 Q Okay. Great. We'll talk about it in a minute.



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1 But the first page of the exhibit is actually part  
2 of the report by the rehabilitation counselor that  
3 determined that Justin's functional assessment was that  
4 he could perform the essential functions of the job,  
5 right?

6 MR. KIM: Objection, Your Honor. It calls  
7 for a legal conclusion.

8 THE COURT: Overruled. That's, in fact, what  
9 he decided.

10 A Yes.

11 Q Okay. Great.

12 THE COURT: Mr. Griffin, we're going to take  
13 our afternoon break at this time.

14 Ladies and gentlemen, we'll take our  
15 afternoon recess at this time. We'll reconvene at  
16 4:05. During the recess, please do not discuss your  
17 testimony among yourselves or the case among  
18 yourselves.

19 You're excused to the jury room.

20 (The jury exits at 3:48 p.m.)

21 THE COURT: All right. Will counsel come to  
22 bench, please.

23 (Conference at the bench, as follows:)

24 THE COURT: Mr. Griffin, I want you to stop  
25 reacting to the answers. Almost every answer you

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1 either react with great, okay, wow. I just want all of  
2 that out. So don't react to the answer. Just ask your  
3 next question. All right? I know it's habit.

4 MR. GRIFFIN: It is habit.

5 THE COURT: It is habit, but try to be more  
6 disciplined about it.

7 MR. GRIFFIN: I will try to be more  
8 disciplined. I have people to come elbow me if it  
9 happens again. I appreciate Your Honor sharing that  
10 with me outside the presence of the jury.

11 THE COURT: All right. Did you want to make  
12 any other -- do you want to elaborate on any objection  
13 to the Court's allowing him to lead an adverse witness?

14 MR. KIM: Yes, Your Honor. Dr. Yoder is not,  
15 I believe, accused of any discriminatory animus. He is  
16 simply an employee of the FBI as are many of these --  
17 as are 90 percent of the witnesses. We don't think  
18 that they've established any adversity between them,  
19 and so I don't think that he should be allowed to be  
20 treated as an adverse witness.

21 THE COURT: I'm going to give you some  
22 leeway. I would try to really make your -- to the  
23 extent you're going to lead, make them very succinct.

24 MR. GRIFFIN: Shorter questions you mean?

25 THE COURT: Shorter.

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1 MR. GRIFFIN: Okay. Fair enough.

2 THE COURT: All right. I may require you to  
3 ask not nonleading questions at some point depending on  
4 what the subject matter is.

5 MR. GRIFFIN: I think he'll become more  
6 adverse as we go forward, but thank you, Your Honor.

7 THE COURT: All right. We'll stand in  
8 recess.

9 (Recess from 3:50 p.m. until 4:06 p.m.)

10 (The jury is not present.)

11 THE COURT: Ready to proceed?

12 MR. GRIFFIN: Yes, Your Honor.

13 THE COURT: All right. Dr. Yoder.

14 All right. Let's bring the jury in.

15 (The jury enters at 4:07 p.m.)

16 THE COURT: Please be seated.

17 You may proceed, Mr. Griffin.

18 Dr. Yoder, you remain under oath.

19 THE WITNESS: Yes, sir.

20 BY MR. GRIFFIN:

21 Q Dr. Yoder, do you mind sharing with the jury what  
22 the results can be of a fitness-for-duty examination  
23 once your office completes that analysis?

24 A What are results?

25 Q What are the different kinds of results that

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1 happen, they pass, they don't pass, what happens. I'm  
2 asking you --

3 THE COURT: What are the possible outcomes?

4 MR. GRIFFIN: Well, thank you, Your Honor.

5 Bless you for that. Bless the Court for that.

6 A Yes. As mentioned earlier, there are 90 plus  
7 percent that will pass without additional concerns  
8 about their risk profile, which is what we're most  
9 concerned about, the operational safety risk. There  
10 are those which we write up recognizing some increased  
11 risk but believe that it is not sufficient to deny them  
12 the opportunity to train. Then there are 2 to 3 to  
13 4 percent per year who we believe exceed that safety  
14 margin and should be discontinued for whatever reason.  
15 Q Okay. So if I understand the outcomes, they  
16 can -- as I hear what you're saying, most of the  
17 outcomes are that the people pass the fitness-for-duty  
18 exam?

19 A That's correct.

20 Q And there is a small percentage who do not pass?

21 A That's correct.

22 Q For agents who don't pass, they are removed from  
23 the position of special agent?

24 A They are.

25 Q Okay. And the applicants who are applying for the

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1 jobs, the ones they don't pass, they are discontinued  
2 in processing and their conditional offer revoked?

3 A The ones that don't pass?

4 Q Yes, sir.

5 A Yes.

6 Q Okay. Great.

7 Can you please share with the jury what Exhibit 5  
8 is.

9 A Exhibit 5 looks like the medical package that was  
10 reviewed for Applicant Slaby.

11 Q Okay. Great.

12 If we could look at the second page. The jury  
13 will hear about this, but I just want to get you to  
14 tell us: What is the second page of Exhibit 5, the  
15 fitness-for-duty file for Justin Slaby?

16 A That's the special agent essential tasks list.

17 Q Okay. You are well familiar with the special  
18 agent essential tasks list that had been developed by  
19 the FBI for the special agent position?

20 A Yes.

21 Q Okay. And this list of the essential functions of  
22 the special agents jobs, do you disseminate that to  
23 physicians who actually help you with your  
24 fitness-for-duty examinations?

25 A We do.

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1 Q All right. Has this list changed in any way since  
2 the date that you declared Justin Slaby fit for duty?

3 A No, it has not.

4 Q Okay. At any point in time has there been any  
5 effort that you know of to add to this list any tasks  
6 that require the use of the weak or nondominant hand?

7 A No.

8 Q Okay. Now, in your fitness-for-duty examination,  
9 I'm going to ask you whether or not this information  
10 was received and reviewed by you, that you knew in the  
11 fitness-for-duty examination that Mr. Slaby had been an  
12 Army Ranger. Is that right?

13 A It sounds right, yes.

14 Q And that he had served tours in Iraq and  
15 Afghanistan?

16 A I don't remember specifically, but yes, he had a  
17 military record to some distinction, yes.

18 Q Right. And you understood that he had had a  
19 grenade accident -- or faulty grenade explode in his  
20 left nondominant hand?

21 MR. KIM: Objection, Your Honor, hearsay.

22 THE COURT: Overruled. It is based on what  
23 information he was provided.

24 A The writeup and his quote was in there. He was  
25 prepping a stun grenade when it went off in his hand,

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1 yes.

2 Q In other words, that's part of the  
3 fitness-for-duty file that you gathered to understand  
4 what happened to his left hand?

5 A Correct.

6 Q The left hand in Mr. Slaby's case is his weak  
7 hand, not his strong hand; is that right?

8 A I believe that's right.

9 Q And share with the jury how Justin had compensated  
10 for the injury to his left nondominant hand.

11 A The VA, the Veterans Administration, had fit him  
12 with a number of prostheses to try to return his  
13 function to as close to normal as could be with a  
14 prothesis.

15 Q Okay. At the end of the day, with his  
16 state-of-the-art prosthetic left hand, he compensated  
17 for this injury to the extent of a fitness-for-duty  
18 finding by your office?

19 A That's correct.

20 Q And when you were doing your analysis, did you  
21 actually have information and photographs of the  
22 prosthetic devices that Mr. Slaby uses himself?

23 A Yes, we did.

24 Q Was your goal, in making this decision of whether  
25 or not he would be declared fit for duty, to base it on

Yoder - Direct

1 his actual ability to perform the essential functions  
2 of the job?

3 A What we try to do is make sure that they meet the  
4 minimum physical abilities to perform the essential  
5 duties, yes.

6 Q And the essential duties you're referring to are  
7 the special agent essential tasks that we referred to a  
8 moment ago?

9 A Yes.

10 Q This is the only version of any task list that the  
11 FBI has ever given you for assessing whether an agent  
12 is qualified to perform the job of special agent,  
13 right?

14 A This is the one we developed, yes.

15 Q And it is the only one?

16 A It is.

17 Q Okay. In connection with your fitness-for-duty  
18 evaluations, Dr. Yoder, do you review fitness-for-duty  
19 packages for special agents and applicants with  
20 disabilities?

21 A Yes.

22 Q And in connection with fitness-for-duty  
23 examinations, are you asked occasionally to discuss the  
24 area of accommodations that would allow successful  
25 performance of the job?



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1 A Yes. That's a whole program in and of itself, a  
2 reasonable accommodation process.

3 Q Right. In other words, you were assessing special  
4 agents with not only hand issues but people with  
5 diabetes, cardiovascular issues, seizure disorders, and  
6 things like that. Am I right?

7 A Yes.

8 Q When it comes to accommodations, I'd like you to  
9 share with the jury, if you would, whether you ever  
10 believed that Mr. Slaby needed any accommodations in  
11 order to perform the essential functions of the special  
12 agent position.

13 A Well, our conclusion was that he deserved an  
14 opportunity to demonstrate his capability in training,  
15 yes. He was passed.

16 Q Let me object respectfully as not responsive.

17 I know you did that, but my question was did you  
18 identify any accommodations that he would need to be  
19 able to perform the essential functions of the job.

20 A No. Just his prostheses that he already had.

21 Q And during that process, did Mr. Slaby or Justin  
22 ever ask you or tell you that he needed any  
23 accommodations to perform the special agent task list?

24 A No.

25 Q Okay. So if I understand it, he was declared fit

Yoder - Direct

1 for duty without the need of any accommodations?

2 A Correct.

3 Q Now, if you don't mind looking through the PX5 a  
4 little bit further. Further on in, in addition to the  
5 247 essential functions that are listed, if we go to  
6 page -- let me make sure I have my pages -- page 125 of  
7 the exhibit in the bottom right-hand corner -- he's  
8 found it. Great. Great. Great.

9 A Okay.

10 Q I'd like, if you don't mind, Dr. Yoder, to share  
11 with the ladies and gentlemen of the jury what this  
12 form is.

13 A It's entitled New Agent Physical Activities and  
14 asks the treating -- or rather not the treating, the  
15 examining physician who we would contract with to go  
16 through the examination findings and determine whether  
17 there's any problem that they would see in performing  
18 these critical duties of the training situation.

19 Q And on this form, it appears -- well, let me ask  
20 you: Which physician actually signed this form and  
21 answered the questions?

22 A I did.

23 Q Okay. You did that when, Dr. Yoder?

24 A July 26, 2010.

25 Q And my mind is a little faded. At the bottom,

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1 underneath your signature -- but if I'm reading your  
2 handwriting, did you say based upon fitness-for-duty  
3 exam and functional capacity evaluation performed  
4 5-10-10 that Justin Slaby was fit for duty?

5 A Correct.

6 Q Okay. And in terms of the activities that are  
7 listed there, are they divided into subject matters of  
8 actual physical activities that you are evaluating  
9 whether or not Justin can do?

10 A Yes. These are critical arrest techniques.

11 Q And if we start with number 1, it talks about  
12 takedowns; does it not?

13 A Yes.

14 Q And section 2 talks about personal weapons  
15 attacks; am I right?

16 A Yes.

17 Q And the third section deals with officer survival  
18 techniques, right?

19 A Correct.

20 Q And if you don't mind sharing with the ladies and  
21 gentlemen of the jury, when you certified that Justin  
22 was able to perform a carotid restraint, what does that  
23 mean?

24 A That's a type of hold around the neck, but we  
25 wouldn't actually measure that. We would just say

Yoder - Direct

1 there's no evidence that would interfere with the  
2 person being able to do that.

3 Q And the next section is handcuffing?

4 A Correct.

5 Q We move to -- jump ahead to number 7. It contains  
6 the elements of climbing and vaulting, jumping from  
7 high obstacles, and net rope climbing. Do you see  
8 that, sir?

9 A Yes.

10 Q As I read it here, you have certified that Justin  
11 was qualified and able to perform those three as well,  
12 right?

13 A He was medically qualified, yes.

14 Q Right. Where the form asks yes or no, you have  
15 answered yes?

16 A Yes.

17 Q And that was truthful?

18 A Correct.

19 Q And when it asks about number 8, Yellow Brick  
20 Road, what is that, Dr. Yoder?

21 A As it says below, a 7.2 mile run which includes  
22 various obstacles along the path, rope climbs,  
23 obstacles, natural and manmade.

24 Q Finally, we get to the bottom, number 9, the  
25 section is firearms; is that right?

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1 A Yes.

2 Q In firearms, the description here -- well, let me  
3 ask you: Is the description taken a paraphrase of the  
4 essential tasks list that actually deals with firearms,  
5 the 247?

6 A It should be equivalent to that, yes.

7 Q As I understand it, when I ask you where this came  
8 from, you thought that it came from the Training  
9 Division, if I'm right.

10 A Yes. All the firearms information would tend to  
11 be verified by the Firearms Training Unit.

12 Q Right. The information in this form -- when I  
13 asked you about -- let me just ask you: The  
14 information that's in this form that was asked about  
15 was developed from information you got from the  
16 Training Division?

17 A I believe so.

18 Q Right. Let me just jump ahead. Is it true, sir,  
19 Dr. Yoder, that you first heard of the trainer's claim  
20 that left-hand shooting was an essential function of  
21 the special agent job only after the Training Division  
22 had removed Mr. Slaby?

23 A Yes. It had not come up to me before that time,  
24 no.

25 Q In other words, you learned of their claim for the

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1 first time about this weak-hand shooting only in  
2 connection with Mr. Slaby; is that right?

3 MR. KIM: Objection, asked and answered.

4 THE COURT: Overruled.

5 A To my knowledge, yes.

6 Q Now, let's look at Plaintiff's Exhibit 1 if you  
7 don't mind. Let me know, Dr. Yoder, when you're there.

8 A Yes.

9 Q If we look at this, are the special agent  
10 essential functions listed from 1 to number 247?

11 A Correct.

12 Q Are they grouped in subjects?

13 A They are.

14 Q How detailed would you say this list is in terms  
15 of the subject matter that's covered here?

16 A It's intended to be as thorough as possible.

17 Q And is it -- in terms of the subject matter, for  
18 example, does it have a separate subject matter for  
19 climbing?

20 A For -- what was the question?

21 Q Climbing.

22 A Yes.

23 Q And are there -- let me count them. Are there  
24 approximately ten of the essential tasks list on  
25 page -- Bates 10 that deal with the subject of

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1 firearms?

2 A About 13 it looks like.

3 Q Okay. And at any point in time in the 15 years  
4 you've been at the agency have trainers ever complained  
5 in any way that none of these essential functions have  
6 anything to do with shooting a weapon with the weak  
7 hand?

8 A It has not come up to me.

9 Q And you have in terms of the fitness-for-duty  
10 examinations -- we are going to talk about these in a  
11 moment, but you have reviewed fitness-for-duty  
12 examinations of other people who have had hand  
13 injuries; have you not?

14 A Yes.

15 Q And in terms of Exhibit 1, is this still the  
16 official FBI list of essential functions?

17 A It is.

18 Q There's no other list?

19 A We're developing a new one, but it is not yet  
20 finished.

21 Q And you have no criticism of this list?

22 A No.

23 Q It's the list you use for determining fitness for  
24 duty, right?

25 A Correct.

Yoder - Direct

1 Q And, Dr. Yoder, is it true that the trainers  
2 themselves participated in the study that published  
3 this list of essential functions?

4 A I'm sure they did, yes.

5 Q And those folks, the trainers, had the opportunity  
6 of giving input to tasks that they felt were important,  
7 right?

8 A They were required to give input, yes.

9 Q And in connection with left-hand shooting, to your  
10 knowledge, the trainers never asked that anything  
11 having to do with left-hand shooting be included in the  
12 official essential functions of the FBI position?

13 A This is the list.

14 Q Now, turning to -- back to the fitness-for-duty  
15 packet that you had for Justin, Exhibit 5, when you  
16 conducted this fitness-for-duty examination on  
17 Mr. Slaby --

18 MR. KIM: Objection, Your Honor.

19 THE COURT: Yes.

20 MR. KIM: May we approach?

21 THE COURT: Yes.

22 (Conference at the bench, as follows:)

23 THE COURT: Yes.

24 MR. KIM: Your Honor, they just published to  
25 the jury a document that was not in evidence.



Yoder - Direct

1 THE COURT: What was it?

2 MR. GRIFFIN: I didn't see it. I didn't  
3 know --

4 MR. KIM: It was a picture of Mr. Kolbye's  
5 hand. It was one that we specifically were very  
6 concerned about the jury seeing. It is basically a  
7 graphic picture of a hand that had exploded.

8 THE COURT: I missed it.

9 MR. GRIFFIN: I missed it too, and I'm not --

10 MS. BUTLER: It was a mistake. It did come  
11 up. He was trying to find another exhibit. He brought  
12 it up.

13 MR. GRIFFIN: We don't object if Your Honor  
14 says for them to disregard whatever was on the screen.  
15 I didn't see it.

16 THE COURT: Let's not let it happen again.

17 MS. BUTLER: Yes, Your Honor.

18 MR. GRIFFIN: Thank you, Your Honor. I'm  
19 trying to do better.

20 (Proceedings continued in open court, as follows:)

21 THE COURT: Ladies and gentlemen of the jury,  
22 I'm advised that there may have been published briefly  
23 on your screen an image that's not in evidence. You  
24 are to disregard whatever you saw.

25 Yes.

Yoder - Direct

1 MR. GRIFFIN: Thank you, Your Honor.

2 BY MR. GRIFFIN:

3 Q And, Dr. Yoder, I've been told sometimes I  
4 paraphrase left-hand for weak-hand shooting. So if you  
5 notice me using left hand instead of weak hand because  
6 I'm right-handed, you can correct me or know that I'm  
7 talking about weak-hand shooting if I ever put out my  
8 left hand and say left-hand shooting. Is that okay  
9 with you?

10 A Okay.

11 Q Now, where I was going before we had our break,  
12 Dr. Yoder, when you were conducting the  
13 fitness-for-duty examination, you had the Training  
14 Division's training materials, correct?

15 A I'm not sure what you mean.

16 Q Well, let me just ask you straightaway: Did you  
17 have the Training Division's training materials when  
18 you conducted the fitness-for-duty examination for  
19 Justin Slaby?

20 A I'm not sure what materials you're speaking of.  
21 We had the essential tasks list, which is what we  
22 normally use.

23 Q Let me ask it in this way: Do you have the  
24 training materials available to you if you want to see  
25 the kinds of things that the trainers want them to do,

Yoder - Direct

1 that the trainers are going to want them to do when  
2 they're at Quantico?

3 A We would normally leave that up to the Training  
4 Division, the Firearms Training Unit. I wouldn't ask  
5 for it normally.

6 Q Dr. Yoder, do you mind looking at your deposition  
7 that's before you at page 70, line 20? Let me know  
8 when you're ready, Dr. Yoder.

9 A I am.

10 Q Does this refresh your memory about the fact that  
11 you had the training materials available to you if you  
12 want to see what the trainers are going to want them to  
13 do at Quantico?

14 A If I had requested it, yes.

15 Q In other words, it's available to you?

16 A Yes. It would be if I'd ask for it, correct.

17 Q All right. In Justin's case, there was no issue  
18 presented to you that asked you to have the Training  
19 Division send you anything; is that right?

20 A Well, I wouldn't know what to do with the material  
21 in detail because it's very meticulous about how they  
22 want them to use firearms. That's why we don't get  
23 involved in that part. But I could have asked for it  
24 if I wanted it, yes.

25 Q But what I'm trying to establish, I just want to

Yoder - Direct

1 make sure the jury -- you didn't feel the need to ask  
2 the trainers for anything during your fitness-for-duty  
3 examination of Justin Slaby?

4 A No. That was not my role.

5 Q Right. You had enough information to make the  
6 decision to declare him fit for duty as a special  
7 agent?

8 A I had enough.

9 Q So if you don't mind, take a look at Exhibit  
10 Number 3.

11 A Okay.

12 Q And if you don't mind -- and Mike may be able to  
13 publish this to the jury so that they can see it as  
14 well. But is what we're looking at in this letter of  
15 December 9 --

16 MR. GRIFFIN: And if we can zoom into the  
17 first paragraph or the first couple of paragraphs.

18 BY MR. GRIFFIN:

19 Q Dr. Yoder, is this the actual appointment letter  
20 that an applicant gets hiring them as a special agent  
21 following the fitness-for-duty certification?

22 A It does look like that, yes.

23 Q All right. In other words, they enter as a  
24 special agent, grade GL-10, step 1?

25 A Correct.

Yoder - Direct

1 Q All right. And as I understand it, when they are  
2 hired as a special agent, they have two contingencies  
3 that they have to satisfy. Is that right?

4 A Actually, it's three. It is background  
5 investigation, fit test, and physical examination.

6 Q Yes, exactly. Okay. Thank you.

7 My next question is in order to get to Quantico,  
8 they have to pass these contingencies?

9 A Correct.

10 Q So Justin did that? These contingencies were met?

11 A He did.

12 Q And in terms of the due diligence that's done by  
13 the fitness-for-duty folks, how many people are there  
14 in the Health Care Programs Unit that participate in  
15 the process for making a decision whether a person is  
16 fit for duty as a special agent?

17 A It would normally go to the nurse that covers the  
18 office, the nurse that is in our office that reviews  
19 the results of the test, myself, and then it would go  
20 through our unit chief to the chief medical officer.  
21 So it would be four or five levels of review.

22 Q When the team who's making a decision on fitness  
23 for duty is making that decision, it is thorough; is it  
24 not?

25 A Yes.

Yoder - Direct

1 Q And it is thorough because it impacts on the FBI's  
2 decision whether or not to hire a person as a special  
3 agent?

4 A Correct.

5 Q In other words, whether they're hired or not  
6 depends on the success of the fitness-for-duty  
7 examination?

8 A That's part of it, yes.

9 Q And as we move through Exhibit Number 5 -- it is a  
10 rather thick exhibit -- we see, do we not, on Bates  
11 stamp page number 118 your analysis and documentation  
12 of your decision to declare Justin Slaby fit for duty?

13 A Yes.

14 Q And if we look up in the -- at the top right  
15 corner of the exhibit on page 118 -- I'm not a doctor.  
16 So if you don't mind reading what your section chief  
17 wrote about your decision to certify Justin Slaby as  
18 qualified and fit for duty.

19 A Dr. Wade, the chief medical officer, wrote that he  
20 concurred. However, we need to carefully follow the  
21 issues of PTSD -- that's post-traumatic stress  
22 disorder -- and his cardiac murmur still pending a  
23 cardiology evaluation.

24 Q And, Dr. Yoder, the HCPU did rule out PTSD, as  
25 well as cardiological problems before he was hired; is

Yoder - Direct

1 that right?

2 A Yes, we evaluated those favorably.

3 Q Okay. In other words, if we read Dr. Wade's  
4 concern, he wanted to make sure PTSD wasn't an issue  
5 and make sure that cardiac issues were not an issue?

6 A Correct.

7 Q And in this process, Dr. Wade did not question or  
8 discuss in any way on the document any potential  
9 concern about Justin Slaby being able to be qualified  
10 with the use of his prosthetic left hand; am I right?

11 A Well, he concurred with my comment that additional  
12 risks are difficult to anticipate but have been  
13 successfully evaluated to the extent that it is  
14 possible. That was my closeout line on that.

15 Q Right. But I'm saying his notes don't have  
16 anything to do with Justin's left hand, right?

17 A No.

18 Q Okay. And what you've done for the ladies and  
19 gentlemen of the jury -- we don't have to read it word  
20 for word because they can see it at some point. But  
21 you go through an analysis of all of the tasks that you  
22 determine that Justin was able to do?

23 A We looked at the results of the functional  
24 capacity evaluation, yes.

25 Q In other words, you describe on page 2 at the

Yoder - Direct

1 bottom a description of the essential functions of the  
2 job; do you not?

3 A Yes, the selected ones that were of concern.

4 Q Right. And in your due diligence to verify that  
5 Justin was qualified to perform all of the essential  
6 functions for him, you asked that certain of the 247 of  
7 those functions be verified by a functional assessment.  
8 And those were the ones that involved potentially the  
9 use of the nondominant left upper extremity; is that  
10 right?

11 A Are you reading somewhere?

12 Q Well, was the purpose of the functional assessment  
13 to make sure that there were no issues with his upper  
14 left -- well, let me ask you: What do you call this?

15 A Yeah, you're right, the left upper extremity.

16 Q Thank you, left upper extremity.

17 Was the purpose of this functional assessment to  
18 make sure nothing with this left upper extremity would  
19 interfere with his being a special agent?

20 A That was one of the goals, yes.

21 Q Your report goes through and explains that; does  
22 it not?

23 A Yes.

24 Q All right. And on the final page of your report,  
25 page 120, you give a summary of your opinion; do you



Yoder - Direct

1 not?

2 A Yes.

3 Q And you point out that you'd had a detailed  
4 functional capacity evaluation from a highly qualified  
5 physical therapist with a doctoral degree in biomedical  
6 engineering with the help of special agent volunteers  
7 during the process; is that right?

8 A Correct.

9 Q And you point out that they concluded that Justin  
10 Slaby is able to perform successfully the special agent  
11 essential tasks, right?

12 A That's right.

13 Q And you relied on that and agreed with that?

14 A Yes.

15 Q And then you actually pointed out some things that  
16 might be an issue in training in your next sentence.  
17 You say that problems might be anticipated in the  
18 performance of -- let me make sure -- defensive tactics  
19 for use of the prosthesis and protection in boxing and  
20 wrestling. Do you see that?

21 A Yes.

22 Q Okay. Was your concern with boxing and wrestling  
23 that perhaps Justin might hurt someone with his new  
24 prosthetic left hand?

25 A Yes. That was part of it, yes.

Yoder - Direct

1 Q All right. We agreed nothing in this analysis, in  
2 the entire analysis events as any even potential  
3 concern with his inability to comply with firearms?

4 A There is not.

5 Q And you alluded to one of the sentences. You  
6 alluded to additional risks are difficult to anticipate  
7 but have been successfully evaluated to the best extent  
8 as possible; is that right?

9 A That's correct.

10 Q And it's true that you would not have declared him  
11 fit for duty if you felt he were a direct threat or a  
12 significant risk?

13 A That's correct.

14 Q And then your recommendation was that he should be  
15 provided the opportunity to demonstrate the essential  
16 tasks and that the post-traumatic stress disorder  
17 should be ruled out; is that right?

18 A Yes.

19 Q And therefore, you concluded that he was fit for  
20 duty?

21 A We recommended he continue, yes.

22 Q And this is dated -- let's see -- May 26, 2010?

23 A Yes, it is.

24 Q So on December 9, that is the day that he was  
25 hired as a special agent?

Yoder - Direct

1 A I believe it was.

2 Q If I asked this, I apologize. Do you have any  
3 criticism whatsoever of the special agent essential  
4 functions list?

5 A It has served our purpose for over ten years.

6 Q And in other words, this particular list of the  
7 247 tasks was prepared in 2000; was it not?

8 A Actually, 1999, but close enough.

9 Q And that report, Dr. Yoder, was more than 600  
10 pages?

11 A It was extensive, yes.

12 Q All right. And hundreds of special agents around  
13 the country, at Quantico, and elsewhere were asked to  
14 determine whether specific tasks were essential or  
15 nonessential; am I right?

16 A That's correct.

17 Q And in the report that tabulated all the things  
18 that special agents actually do in the field, they use  
19 the word N for not essential and E for the word  
20 essential?

21 A I believe that's right, yes.

22 Q And the report that was delivered to the FBI was  
23 done by a highly regarded firm who assists  
24 organizations to generate the essential functions of  
25 the job for their clients?

Yoder - Direct

1 A Yes.

2 Q And one of the purposes of the list is to comply  
3 with the Rehabilitation Act; am I right?

4 A Yes.

5 Q In other words, you at the agency want to have a  
6 list that people can go to and know what the essential  
7 functions of the job are?

8 A Yes.

9 Q Now, if we cut to the chase here for a moment, so  
10 the jury follows us, what happened within approximately  
11 90 days of when Justin was hired as a special agent is  
12 the trainers had removed him from the training class.  
13 Is that right, Dr. Yoder?

14 A I believe it is, yes.

15 Q And, Dr. Yoder, did you find out after the fact  
16 that the trainers were unhappy that the HCPU had  
17 cleared him for duty?

18 A I'm sure that was part of it but only because what  
19 they had to go through to perform the evaluation  
20 probably.

21 Q You learned after the fact that they were unhappy  
22 with Dr. Starsky's evaluation that he did with the two  
23 special agents, right?

24 A I don't have any direct knowledge of that, no.

25 Q If you don't mind looking at page 116, line 17 of

Yoder - Direct

1 your deposition, and I'll ask if that refreshes your  
2 memory that the trainers were unhappy with Starsky  
3 because they felt his evaluation was inadequate.

4 A What page again?

5 Q Page 116, line 17.

6 A See, I'm not sure that's the right page. Would  
7 you read what you have?

8 Q Sure. Page 116, line 17. Let me go to mine.

9 A Your assessment whether or not he was a direct  
10 threat is the question?

11 Q Let me find it. Thank you.

12 On line 7, I'm told. I beg your pardon,  
13 Dr. Yoder. In other words, does this refresh your  
14 memory that it got reported to you that the trainers  
15 felt that the functional assessment done by Dr. Starsky  
16 was inadequate?

17 A Okay. I guess Dr. Wade had reported that to me  
18 according to this. That may be correct, yes.

19 Q Right. From your standpoint, if we look at the  
20 first page of Exhibit 5, that actually is the fax cover  
21 sheet of Dr. Starsky's report that was submitted to you  
22 during the fitness-for-duty process, if I'm right.

23 A Yes.

24 Q And you felt then that he was a highly qualified  
25 person to conduct this assessment; did you not?

Yoder - Direct

1 A That was my opinion based upon his credentials,  
2 yes.

3 Q And that is your opinion today as well; isn't it?

4 A Yes.

5 Q And is his report and cover sheet in Plaintiff's  
6 Exhibit 5?

7 A I believe it is, yes.

8 Q And if you'll look at the first page --

9 MR. GRIFFIN: Mike, if you don't mind pulling  
10 up the first page of Exhibit Number 5.

11 BY MR. GRIFFIN:

12 Q We'll follow along. If I understand the first  
13 page, this is the fax that the FBI sent to Dr. Starsky  
14 to ask him to conduct this functional assessment of  
15 Justin Slaby's skills.

16 A Yes.

17 Q And this was done before you declared him  
18 qualified for the job?

19 A Correct.

20 Q And the person who filled out the form, share with  
21 the jury who Gretchen Devins is.

22 A Ms. Devins is one of our nurses in charge of that  
23 field division.

24 Q Is she a highly qualified person in the HCPU  
25 insofar as fitness-for-duty process goes?

Yoder - Direct

1 A Well, that would be reserved to me, but she has a  
2 fair amount of knowledge of it, yes.

3 Q Does she on the form actually give Dr. Starsky  
4 instructions as to what the FBI wants him to do?

5 A Just furnishes the task list it looks like here.

6 Q She identifies the people who need this  
7 information is the FBI fitness-for-duty people; am I  
8 right?

9 A Yes.

10 Q Okay. And the fax that she sent to Dr. Starsky  
11 says that the essential job tasks that you were  
12 concerned about were the essential job requirements  
13 that may require the use of the upper extremities?

14 A Correct.

15 Q And that's what Dr. Starsky evaluated along with  
16 the two special agents?

17 A Yes.

18 Q And one of the special agents was a firearms  
19 trainer from Milwaukee?

20 A I believe that's true, yes.

21 Q You would expect firearms trainers to know what's  
22 required of a special agent in terms of firearms,  
23 right?

24 A I would.

25 Q Now, getting back to the trainers, was there ever

Yoder - Direct

1 any reaching out by the trainers to you to figure out  
2 any way to help make sure that Justin succeeds and  
3 completes the Training Academy?

4 A No.

5 Q Has anybody explained to you why none of the  
6 trainers ever reached out and talked to you about their  
7 opinions that Justin Slaby should be removed from  
8 training 90 days after he had been hired as a special  
9 agent?

10 A Well, once we qualify them, the Training Division  
11 has an independent responsibility to determine whether  
12 they meet the essential duties of the position. So  
13 that's a different process. They don't normally come  
14 back to us unless there is a new injury or an illness  
15 that causes a problem.

16 Q I know. But has anyone explained to you why no  
17 one reached out to you to try to talk about ways to  
18 make sure Justin succeeded and finished the training as  
19 opposed to being removed?

20 A No.

21 Q We agree, do we not, Dr. Yoder, nobody over the  
22 trainers -- none of the trainers have any expertise in  
23 prosthetics or mitigation of hand injuries like Justin  
24 has accomplished, right?

25 A I don't believe they do.



Yoder - Direct

1 Q You're not aware of any effort on the part of the  
2 trainers before removing him from the academy to  
3 involve the expertise of anyone in the area of  
4 prosthetics and the benefits that they can provide to a  
5 person with a hand injury?

6 A I don't believe so.

7 Q And in terms of the ultimate decision that was  
8 made by the trainers, you did not have anything to do  
9 with that decision, right?

10 A No.

11 Q You learned about it after the fact?

12 A In process. I think Dr. Wade mentioned the  
13 difficulty they were having evaluating his firearms  
14 capability.

15 Q And, Dr. Yoder, you're aware, are you not, of the  
16 dispute between the physicians who felt that Justin  
17 should not have been medically recycled and the  
18 trainers who wanted to medically recycle him; aren't  
19 you?

20 A Yes.

21 Q And you and I have been over the e-mails where the  
22 doctors did not think it was appropriate to medically  
23 recycle this man from the Training Academy, right?

24 A Correct.

25 Q I would like for you to share with the ladies and

Yoder - Direct

1 gentlemen of the jury why it was inappropriate to  
2 categorize this man's removal as a medical recycle.

3 A Well, my opinion was the same as Dr. Fabbri, who  
4 wrote his, that a medical recycle is based upon an  
5 injury or an illness that prevents a person from going  
6 forward. We would normally return them to their field  
7 division sponsor until whatever condition was treated,  
8 resolved, and then evaluate them for return.

9 In this case, there was no change in his  
10 condition. So there was nothing to treat, you know.  
11 To us the prosthetic issue was a performance issue and  
12 not a medical one. That was the reason for the  
13 disagreement. I might say on the side of the Training  
14 Division when they did force that medical recycle, that  
15 did open the possibility that other prosthetic changes  
16 might allow him to return. So if they had done the  
17 normal performance route, he would not have had an  
18 opportunity to return.

19 Q You mean if they had kicked him out on another  
20 basis other than medical recycling?

21 A That's right.

22 Q However, you and I have been over the FBI's own  
23 official training regulation booklet; have we not?

24 A I believe we did.

25 Q We've agreed that the trainers have never insisted

Yoder - Direct

1 that Justin was unsuitable; have they?

2 A Unsuitable?

3 Q Yeah. In other words, if we looked -- when we  
4 looked through this, we found three different grounds  
5 for removing a special agent from training. One was  
6 suitability, the other was proficiency, and the other  
7 one was medical recycling. Do you remember?

8 A I believe that's right.

9 Q None of the trainers ever, you've heard, insisted  
10 that Justin was not proficient or unsuitable, right?

11 A I don't know what their final analysis was on  
12 those issues, but it turned out to be medical.

13 Q Right. And that's what you and Dr. Fabbri reacted  
14 to and objected to; am I right?

15 A That's correct.

16 Q And --

17 A The other thing that would have happened -- I  
18 mean, he was reassigned to a support role. So if he  
19 had been not proficient, they would have just released  
20 him from service. So...

21 Q In other words, if they had had grounds to remove  
22 him for proficiency, then he might not have kept his  
23 support job?

24 A Correct.

25 Q I see what you're saying.

Yoder - Direct

1 But they have never insisted that he failed in any  
2 way in terms of the proficiency requirements of the  
3 regulation; have they?

4 A I'm not sure I can answer that.

5 Q If they did, you don't know about it?

6 A I don't.

7 Q Fair enough.

8 What happened on this medical recycle, though, if  
9 we cut to the chase, the medical folks and the  
10 fitness-for-duty folks were overruled; were they not?

11 A Yes. I guess you would say that.

12 Q And when we talk about -- let me go to my notes  
13 here for a second, Dr. Yoder.

14 The objection that you and Bill Fabbri had to what  
15 the trainers were doing was because -- as Dr. Fabbri  
16 put it at one point -- people who have disabilities  
17 manage to correct them and make themselves better,  
18 right?

19 A Yes.

20 Q And your and Dr. Fabbri's argument to the trainers  
21 was that just as a person who has vision problems can  
22 improve their vision, people can mitigate a hand injury  
23 to the point of fitness for duty and that should not be  
24 a basis for removal from the academy, right?

25 A That sounds right.

Yoder - Direct

1 Q Okay. And you agreed with Bill Fabbri that  
2 Mr. Slaby had mitigated the hand injury he had to the  
3 point he had compensated and improved to the point  
4 where he was fit for duty and qualified, right?

5 A He was medically qualified, correct.

6 Q And he was just as qualified when they wanted to  
7 remove him from the academy as he was when you declared  
8 him qualified, right?

9 A There was no change in his medical condition.

10 Q Right. And because he was just as fit when they  
11 wanted to remove him as when the HCPU had found him  
12 qualified, you guys objected?

13 A Yes.

14 Q And somewhere in management you guys were  
15 overruled, right?

16 A Yes.

17 Q And the Training Division people got to remove him  
18 on the basis of his medical recycle?

19 A Yes.

20 Q Even though the training regulation does not  
21 support it?

22 A Well, we often -- in the normal injury and illness  
23 categories, sometimes the Training Division acts  
24 without telling us until it's already done. So it's  
25 not uncommon for this to happen this way.

Yoder - Direct

1 Q Well, I'm not asking you how common it is they  
2 would disregard the regulation. I'm asking you in this  
3 case by declaring that he would be removed under  
4 medical recycling, they violated their own training  
5 regulations; didn't they?

6 MR. KIM: Objection, Your Honor, leading and  
7 argumentative.

8 THE COURT: I'll let him answer based on his  
9 own assessment and opinion.

10 A I'm not sure how to answer that.

11 Q Well, you explained to the ladies and gentlemen of  
12 the jury why it should not have been called a medical  
13 recycling.

14 A Correct. I'm not sure which of the others they  
15 should have used, but we just did not feel there was a  
16 change in his medical condition. It should have been  
17 based on performance.

18 Q But they didn't use any basis for removing him  
19 except for the medical recycle, right?

20 A That's right.

21 Q And what I'm saying is that by calling it a  
22 medical recycle, they acted inconsistently with their  
23 own training regulation?

24 A Well, I guess you could say that.

25 Q Dr. Yoder, is it true that to your knowledge that

Yoder - Direct

1 Justin was the first young man with a prosthetic hand  
2 to ever be declared fit for duty as a special agent?

3 A In my 15 years, certainly.

4 Q Let me ask you this: As we sit here today, are  
5 you proud and stand by your role in certifying Justin  
6 Slaby as fit for duty as a special agent?

7 A He's medically qualified, but no physical  
8 examination can predict whether somebody is going to  
9 successfully complete the FBI Academy. But yes, we  
10 would call him medically qualified.

11 Q And you stand by that and are proud of that  
12 decision you made?

13 A We made it, yes.

14 Q I want to now turn our attention to other special  
15 agents who have had catastrophic and severe hand  
16 injuries, if that's okay with you. Is that all right  
17 with you, Dr. Yoder?

18 MR. KIM: Objection, Your Honor, relevance.

19 THE COURT: I'm going let him proceed until I  
20 hear some more questions.

21 BY MR. GRIFFIN:

22 Q Dr. Yoder, you and I spent a few hours a couple of  
23 months ago talking about several special agents who'd  
24 had catastrophic hand injuries; did we not?

25 A We did.

Yoder - Direct

1 Q I want to go through some of them one by one, and  
2 I would like to start with a gentleman by the name of  
3 Robert Drdak. And I'll ask you, first, to confirm with  
4 me that he had suffered a catastrophic car wreck  
5 resulting in a severed ulnar nerve that left his entire  
6 arm completely paralyzed.

7 MR. KIM: Objection, Your Honor, relevance.  
8 May we approach?

9 THE COURT: Yes.

10 (Conference at the bench, as follows:)

11 THE COURT: Yes.

12 MR. KIM: My understanding is that the  
13 plaintiff intends to elicit testimony regarding former  
14 special agents, agents that --

15 THE COURT: Can't use one or the other arms.

16 MR. KIM: Well, I mean, that's in dispute.  
17 But the position of the FBI is that that's not relevant  
18 to this case. They're all on board special agents.  
19 Some of them don't have amputated hand -- I believe  
20 none of them have amputated hands.

21 THE COURT: Right.

22 MR. KIM: And then all of them -- or many of  
23 them were eventually passed the fit for duty  
24 qualifications, and they're not new agent trainees.  
25 And so they're not relevant. They're not similarly



Yoder - Direct

1 situated to Mr. Slaby.

2           And specifically, I just wanted to point out  
3 medical records of Agent K.K. -- the pictures that went  
4 up were his hand pictures, and they're basically  
5 pictures that show what his hand looked like soon after  
6 a grenade had gone off in his hand. We think that they  
7 are completely misleading and shocking and prejudicial  
8 because he had multiple surgeries. That is not what  
9 his hand looks like now. In fact, we're going to have  
10 deposition testimony that's going to be shown on video  
11 of Agent K.K. that shows what his hand looks. It is  
12 clearly very different and misleading.

13           THE COURT: What do you want to get out of  
14 this witness?

15           MR. GRIFFIN: I'm not going to show any  
16 pictures, Your Honor.

17           THE COURT: I know. But what do you want to  
18 get out of this witness?

19           MR. GRIFFIN: The work experience of past  
20 incumbents with the job.

21           THE COURT: What does he have personal  
22 knowledge about, Dr. Yoder?

23           MR. GRIFFIN: He has personal knowledge of  
24 the injuries. These others got fit for duty despite  
25 the fact that they have a paralyzed hand.

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1 THE COURT: He evaluated them?

2 MR. GRIFFIN: Some of them he evaluated.

3 Some of them he identified the records and, as a  
4 30(b)(6) witness, told me about these agents. They're  
5 clearly relevant.

6 THE COURT: Putting aside relevance, I'm  
7 going to allow you to put in evidence that there were  
8 other agents who had injuries that impaired their  
9 ability to shoot because I think it goes to whether or  
10 not it was a nonessential function or an essential  
11 function. That doesn't mean you can ask this witness  
12 about him unless he has some involvement in assessing  
13 those people or has some personal knowledge of who  
14 these people were and whether it, in fact, affected  
15 their ability to shoot.

16 Why would you ask this witness questions  
17 unless he has some personal knowledge?

18 MR. GRIFFIN: Because they served him up as a  
19 30(b)(6) witness.

20 THE COURT: He was a 30(b)(6) on this?

21 MR. GRIFFIN: Yes. Yes, Your Honor. This is  
22 why he testified about the essential functions, about  
23 each of their arms --

24 MR. KIM: No, Your Honor.

25 I'm sorry.

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1 MR. GRIFFIN: He testified about each of  
2 their arms.

3 THE COURT: If he were the 30(b)(6), I would  
4 let him.

5 MR. GRIFFIN: He is. And the records he's  
6 referring to are the files they keep on each of these  
7 agents in connection with their fitness-for-duty  
8 examinations.

9 MR. KIM: Your Honor, he was not the 30(b)(6)  
10 witness designated for these topics.

11 THE COURT: I'm sorry?

12 MR. KIM: My understanding is he was not a  
13 30(b)(6) witness designated for these topics.

14 MR. GRIFFIN: Dr. Wade, his boss was. He  
15 testified about it.

16 THE COURT: All right.

17 MR. GRIFFIN: But he was questioned about it.  
18 And then they used this with Judge Davis saying you  
19 questioned Dr. Yoder about this. So you don't get to  
20 ask Dr. Wade about it. But he is the medical  
21 officer --

22 THE COURT: Right.

23 MR. GRIFFIN: -- who testified that on the  
24 records that the FBI has, that he couldn't use his  
25 hands to shoot. That's the evidence. That's what he's

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1 going to say.

2 THE COURT: But when did he have involvement  
3 with these records? Was it part of his regular duties,  
4 or were these records that were shown to him for the  
5 purposes of this litigation by someone?

6 MR. GRIFFIN: FBI counsel showed him the  
7 records. He studied them. He testified as to four of  
8 them. They gave us two more later. Then they served  
9 up Dr. Wade to testify about the other two who couldn't  
10 use their hands.

11 The records they have produced from their  
12 Sub-M files are admissible records already. We have  
13 offered them. They have objected to them. We will  
14 offer them at the appropriate time. They are records  
15 of the FBI. They show that they could not use their  
16 hand and they were still not restricted from firearms.  
17 That's what the records show.

18 And that is the absolute evidence that Your  
19 Honor absolutely was right to seize on, that the  
20 regulation requires the jury to be able to know whether  
21 or not these agents were able to shoot and qualify and  
22 were restricted in the manner in which this man was  
23 restricted.

24 THE COURT: My only issue is whether this is  
25 the appropriate witness for you to ask these questions

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1 to. I understand if they were the 30(b)(6). As I  
2 understand it, he was not the 30(b)(6) witness on  
3 whether these other agents were impaired in some  
4 fashion that affected their ability to shoot. So if he  
5 wasn't the 30(b)(6) and he doesn't have any personal  
6 knowledge, then how should he be allowed to answer  
7 these questions?

8 MR. GRIFFIN: Your Honor, I don't believe  
9 legally he needs to have personal knowledge of the  
10 injuries these agents --

11 THE COURT: Then on what basis would it be  
12 permissible for him to give any testimony about these  
13 other individuals?

14 MR. GRIFFIN: Because he is the FBI's medical  
15 officer. He deals with these records all the time.

16 THE COURT: Well, that was my question. Did  
17 he deal with these medical records as part of his  
18 ordinary duties?

19 MR. GRIFFIN: When?

20 THE COURT: As part of his ordinary duties.

21 MR. GRIFFIN: He did. He was asked by the  
22 FBI counsel to study these records --

23 THE COURT: As part of the litigation?

24 MR. GRIFFIN: Yes.

25 MS. BUTLER: He does requalify people, Your

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1 Honor, and as to Agent Kolbye, he actually did a  
2 physical exam of him with only two fingers and said he  
3 was fit for duty. So he actually did that one because  
4 the man was at headquarters, and he sat on the Medical  
5 Mandates Board for some of these other people, like  
6 Ryan.

7 THE COURT: All right. Well, I'm going to  
8 require you to lay a foundation with him that he  
9 actually evaluated these people or made some judgments  
10 as part of his duties as a medical officer with the  
11 FBI.

12 MR. GRIFFIN: So let me make sure. So I'll  
13 need to know what proffer I need to make in case you  
14 will not allow me to ask questions. I want to ask him  
15 first about Mr. Drdak, who he did not -- I don't  
16 remember the details, but I don't think he did the  
17 fitness-for-duty examinations for Drdak. He didn't do  
18 them. He reviewed them and testified about them. He  
19 has testified with knowledge about them, and he has  
20 offered opinions about the injuries.

21 THE COURT: But he testified with knowledge  
22 during what? His deposition in this case?

23 MR. GRIFFIN: When the FBI served him up to  
24 us as a witness and prepared him by handing him and  
25 giving him the records that Judge Davis ordered be

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1 produced on these agents.

2 MR. KIM: Your Honor, we did not designate  
3 him as a 30(b)(6) witness. In discovery, obviously,  
4 it's much more expansive about whether he has personal  
5 knowledge.

6 THE COURT: Right.

7 MR. GRIFFIN: Well, why don't we at this time  
8 offer the medical records for all six of the agents,  
9 just offer them at this point and let them make their  
10 objections. They claim they're irrelevant. Your Honor  
11 is absolutely right that they are relevant under the  
12 standard of what past incumbents of the job have done  
13 under the reg. And then, I think, everyone agrees we  
14 can ask him questions about documents that are already  
15 in evidence.

16 THE COURT: Well, I'm not sure you can.  
17 You're really asking him to function as an expert,  
18 correct, for the purpose of this litigation?

19 MR. GRIFFIN: No. I'm asking him to simply  
20 talk about the records that the FBI has maintained on  
21 these six agents who could not use their other -- their  
22 weak hand or their strong hand and were nonetheless  
23 allowed to be weapons carrying and were not restricted  
24 from weapons carrying in direct contrast --

25 THE COURT: Do you intend to call these other

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1 agents?

2 MR. GRIFFIN: Two of them only we could find.  
3 Others we can't find. The only two we could find were  
4 Ryan and Kolbye. The other four are either retired --  
5 I can't remember all of them. Dr. Yoder knows all of  
6 them. He's testified as to all of them.

7 I don't have long to go with these six.  
8 We're not going to spend time. I'm not going to show  
9 them any pictures. I'm just going to get my evidence  
10 out there that these people had catastrophic hand  
11 injuries and were allowed to be weapons qualified and  
12 were never restricted at the time they couldn't shoot.  
13 Everyone agrees that's relevant. He's already  
14 testified about it. It's in the FBI records. One way  
15 or the other we just have to figure out a way to get  
16 that evidence admitted or, hopefully not, but make our  
17 proffer and move on. So we don't want to waste time.

18 MR. KIM: We don't agree that they're  
19 relevant, first of all. Second of all, these agents, a  
20 couple of them had injuries from the 1980s. One of  
21 them, the one he just spoke about, retired, I believe,  
22 in 1997 or 1998 before Dr. Yoder even was hired by the  
23 agency, Your Honor. He clearly has no personal  
24 knowledge. The only personal knowledge he has has to  
25 deal with them showing him these documents in



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1 deposition in discovery.

2 To the extent that he actually evaluated  
3 Agent K.K., Your Honor, we won't object to him  
4 testifying about his evaluation of Agent K.K. because  
5 he has personal knowledge about that. But all of these  
6 other things that he doesn't have any personal  
7 knowledge about, we would object to that, Your Honor.

8 THE COURT: I'm going to let you ask whether  
9 he is aware -- just as a factual matter, whether it has  
10 come to his attention during the course of his duties  
11 as a medical officer that there are other agents that  
12 have continued to serve as special agents after having  
13 an impairment in their ability to shoot.

14 MR. GRIFFIN: Sure.

15 THE COURT: All right. I'm not going to let  
16 you go any further unless you can establish a more  
17 direct foundation in terms of his actual involvement  
18 with assessing these people. All right.

19 MR. GRIFFIN: I think, Your Honor, I will be  
20 brief. I'll be as brief --

21 THE COURT: Or as I understand it, I guess  
22 we're in agreement now that he wasn't the 30(b)(6)  
23 designee as to this issue.

24 MS. BUTLER: He was. He was.

25 MR. GRIFFIN: He was later, yes.

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1 THE COURT: Go ahead.

2 MS. BUTLER: He was, Your Honor. Because  
3 what happened is very late in the day they produced  
4 these records. And when Mr. Griffin talked to  
5 Dr. Yoder about them, then they would not let us go  
6 back to the 30(b)(6) witness, Dr. Wade, because they  
7 said we had already talked to Dr. Yoder, he was  
8 substituting in.

9 THE COURT: All right. Well, we're going to  
10 just go as far as I've said, that you can establish --  
11 we'll straighten out the 30(b)(6) issue during an  
12 evening recess. But I'll let you ask him whether it's  
13 come to his attention in the ordinary course of his  
14 duties as a medical officer that there were people who  
15 have an impairment in their ability to shoot. If you  
16 want to get into anything beyond that, you have to  
17 establish he was personally involved in assessing any  
18 of these individuals. All right.

19 MR. KIM: So, Your Honor, just to clarify, in  
20 the ordinary involvement of his medical duties outside  
21 of this litigation and outside of the filing of this  
22 complaint?

23 THE COURT: Correct.

24 MR. KIM: He needed to know that prior to  
25 this complaint?

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1 THE COURT: Right.

2 MR. KIM: Thank you.

3 MR. GRIFFIN: Let's cut this short then. He  
4 did not have any role in during these qualifications  
5 because he had not been hired yet. In other words,  
6 when I asked him did you know about Drdak until the FBI  
7 prepped you about your deposition and gave us you the  
8 records to look at, he's going to say no.

9 THE COURT: Right.

10 MR. GRIFFIN: But he made admissions in his  
11 deposition. Even if he weren't a witness, they would  
12 be admissions of a party opponent, in view of this very  
13 important facet of the case, that six special agents  
14 had serious hand injuries and were not restricted from  
15 weapons. So it's an admission. It doesn't matter  
16 whether he's a doctor. It doesn't matter whether he's  
17 a 30(b)(6). It doesn't matter whether he's an agent.  
18 He made these admissions. In other words, I think --

19 THE COURT: What admissions did he make?

20 MR. GRIFFIN: He admitted that six times in  
21 the agency -- with the agency, six agents had serious  
22 catastrophic hand injuries.

23 THE COURT: That's based on what? Just  
24 looking at the records he had?

25 MR. GRIFFIN: Absolutely. He made those

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1 admissions based upon their own official records.

2 THE COURT: At this point, I'm only going to  
3 allow you to do what I've said. If he's aware that  
4 these other individuals -- if it came to his attention  
5 these other individuals had an inability to shoot, not  
6 as part of this litigation, but if someone during the  
7 course of their duties have said or brought these  
8 people to his attention, I'll let you ask that.

9 Anything else I'm going to require you to lay a  
10 foundation that he had personally assessed or was  
11 somehow involved.

12 That will probably take us to the end of the  
13 day. Then if you want to bring these other issues to  
14 my attention, then I'll reconsider opening it further.

15 MR. GRIFFIN: Out of respect for the Court,  
16 he did not have personal knowledge of some of these  
17 agents. If that's the bar Your Honor has set --

18 THE COURT: It is.

19 MR. GRIFFIN: -- then we just need to make  
20 our proffer and have him testify about that agent.

21 MS. BUTLER: The 30(b)(6) issue we could sort  
22 out. It might change the course of things.

23 THE COURT: It sounds as though you can't  
24 establish other than through his designation as a  
25 30(b)(6) a foundation for him.

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1 MR. GRIFFIN: That's not true, Your Honor. I  
2 disagree with you 100 percent. It's an admission of a  
3 party opponent, and he admitted these six agents did  
4 that.

5 THE COURT: Based on the medical records  
6 which were provided to him as part of the litigation?

7 MR. GRIFFIN: I don't know what the basis of  
8 his admission was, but that's what he said as a medical  
9 officer that was served up in place of the 30(b)(6)  
10 witness.

11 THE COURT: Well, that's the 30(b)(6) issue.

12 MR. GRIFFIN: You said is that your only  
13 basis, and it is not.

14 THE COURT: Okay. All right.

15 MR. KIM: Your Honor, one thing.

16 THE COURT: Yes.

17 How much more do you have other than this  
18 issue with him on direct?

19 MR. GRIFFIN: I'm only going over the six  
20 agents.

21 THE COURT: This is the last topic?

22 MR. GRIFFIN: Yes. I've got them all listed  
23 here. He knows about all of them. I'm ready to get to  
24 the end of the day and probably could have but for us  
25 being up here.

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1 THE COURT: All right.

2 MR. GRIFFIN: I'm ready to finish up.

3 MR. KIM: One housekeeping issue, Your Honor.

4 We would like to continue the practice that we had  
5 during the evidentiary hearing calling the agents --  
6 these are very personal medical files. To the extent  
7 they are coming in at all in the public record, we  
8 would like to call them by their initials as we were  
9 doing in our previous discovery hearings. I don't know  
10 if plaintiff has any objection to that.

11 MS. BUTLER: One of the women is going to be  
12 showing up. It seems ridiculous to call her -- Why is  
13 she afforded less --

14 THE COURT: All right. I'm going to take up  
15 the medical issues after we release this jury at the  
16 end of the day. Let's finish this up.

17 MR. GRIFFIN: Okay.

18 (Proceedings continued in open court, as follows:)

19 BY MR. GRIFFIN:

20 Q Dr. Yoder, as part of your official duties at the  
21 HCPU as a medical officer, have you become acquainted  
22 with the Sub-M files of special agents who have  
23 suffered severe hand injuries that precluded their use  
24 of that hand for firearms?

25 MR. KIM: Objection, Your Honor, the

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1 clarifying time period.

2 THE COURT: Overruled. I think it's part of  
3 his official duties.

4 A Yes.

5 Q Share with the jury some of those situations of  
6 special agents who have suffered severe or catastrophic  
7 hand injuries that precluded their ability to use that  
8 hand for firearms.

9 A The two most recent cases that come to mind are a  
10 special agent in the New York division who injured his  
11 hand in an accident where a propeller struck his hand  
12 when he was swimming and lost several of his fingers in  
13 that he required firearms and raids and arrest critical  
14 duty restrictions for the rest of his career  
15 essentially, which was about an additional two years,  
16 and recently retired.

17 Q Let's work backward. That's the first one.

18 Let's go to -- we will go one at a time. You just  
19 tell us those that you've been made aware of in your  
20 official duties.

21 A Another fairly recent one was a female special  
22 agent, I believe again in the New York division, who  
23 received an injury to her hand when chemotherapy was  
24 used for her cancer treatment and actually what's  
25 called extravasated on the dorsum of her hand, meaning

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1 it went into the tissue outside the vein. It's A very  
2 caustic type substance. So it prevented healing and  
3 injured the nerve in that hand. So that she was taken  
4 to our Medical Mandates Evaluation Board to review her  
5 ability to continue as a special agent because it  
6 looked like her firearms restrictions would be  
7 indefinite.

8 And she appealed that determination that she was  
9 not qualified and was allowed an additional six months  
10 to see if she could train with the other hand in her  
11 weapons bearing requirements. She was successful in  
12 that and was returned to her full duty.

13 Q So that's number two. What is the third one  
14 moving backward in time?

15 A There was an agent -- let's see. These are fairly  
16 old cases from the '80s who -- I think his was a motor  
17 vehicle accident.

18 MR. KIM: Objection, Your Honor, lack of  
19 personal knowledge.

20 MR. GRIFFIN: Let me object to the sidebar  
21 when he's in the middle of the witness' answer.

22 THE COURT: Well, why don't you ask the next  
23 question and make sure the foundation that we've talked  
24 about is here for these others.

25 BY MR. GRIFFIN:



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1 Q You have reviewed that file as part of your  
2 official duties; have you not?

3 A I have.

4 Q Okay. Please proceed.

5 MR. KIM: Objection, Your Honor. May we  
6 approach?

7 THE COURT: I'm going to overrule the  
8 objection if it's part of his official duties.

9 A There are two that are fairly similar. I'm trying  
10 to disentangle them in my mind. One was an agent from  
11 1972, a hire who --

12 MR. KIM: Objection, Your Honor. May we  
13 approach?

14 THE COURT: If it's something other than what  
15 we've already talked about.

16 MR. KIM: Yes, Your Honor, clarification.

17 THE COURT: All right.

18 (Conference at the bench, as follows:)

19 THE COURT: All right.

20 MR. KIM: Your Honor, I apologize for the  
21 sidebar. My understanding of the Court's order was  
22 that it would have to be related to prior to this  
23 litigation. The Individual that Mr. --

24 THE COURT: Not so much prior to this  
25 litigation but as part of his official duties, not

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1 something he was given purely for the purpose of  
2 looking at for purpose of this litigation.

3 MR. KIM: That is precisely what -- that is  
4 precisely why this special agent's medical files were  
5 given.

6 THE COURT: I assume that's what he  
7 understands when you say official duties. It would be  
8 his duties --

9 MR. KIM: He misunderstands.

10 THE COURT: It would be his duties as a  
11 medical officer.

12 MR. GRIFFIN: Yes.

13 THE COURT: Not purely for looking at  
14 something for the purposes of this litigation, but for  
15 the purposes of discharging some obligation he had as a  
16 medical officer to evaluate these people. Anyway,  
17 that's my ruling. So if he's telling -- if he's not  
18 testifying to something other than on that basis --

19 MR. GRIFFIN: Well, I've asked him the  
20 question Your Honor asked me to ask him precisely the  
21 way you asked me to ask him.

22 THE COURT: Right.

23 MR. GRIFFIN: He gave me an affirmative  
24 answer. He's interrupted two of his answers when he  
25 was about to share relevant information to the jury. I

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1 don't believe it's appropriate to interrupt the  
2 witness' answer, especially when I faithfully complied  
3 and asked the precise question.

4 THE COURT: Do you understand my ruling now  
5 in terms of what I'm allowing him to testify to? This  
6 would be any information, any knowledge he has of these  
7 people that came to him at any time in his capacity as  
8 a medical officer for the purposes of his discharging  
9 his duties as a medical officer.

10 MR. GRIFFIN: Let me write this question  
11 down.

12 THE COURT: And not purely for the purposes  
13 of this litigation, not purely for the purposes of  
14 something he was given to look at. If the only purpose  
15 in his looking at this was for the purposes of this  
16 litigation, it was for -- what I'm going to let him  
17 testify to is if he was given this information for the  
18 purposes of his evaluating these people for the  
19 purposes of the FBI's making a decision about what to  
20 do with these people. All right.

21 MR. GRIFFIN: I am not going to ask him  
22 anything about what he has done to prepare for  
23 litigation. That's not -- I have no intention of  
24 asking him that question. They absolutely can ask that  
25 question. But I am going to ask him if it is part of

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1 his official duties to look at Sub-M files and  
2 determine what to do with other people.

3 He will tell me that he reviews old Sub-M  
4 files to make sure they're consistent and make sure  
5 they treat people similarly, that he looks at those all  
6 the time. He's qualified to do that and has done that.  
7 In this particular case, he has looked at a number of  
8 hand injuries in connection with Mr. T.F. and Ms. S.R.

9  
10 THE COURT: What you said is fine as long as  
11 that what we're talking about is not something he was  
12 given purely for the purposes of this litigation, if it  
13 had some purpose within the FBI in terms of discharging  
14 his duties other than as a witness at his deposition.

15 MR. GRIFFIN: I will establish other reasons  
16 why he looks at these records other than testifying in  
17 court.

18 MR. KIM: Your Honor, if I may, if you could  
19 make the instruction to the witness because I don't  
20 believe he understands the questioning. He thinks that  
21 he's talking about all of these witnesses, and he just  
22 started talking about one of them. He clearly doesn't  
23 understand, Your Honor. I think that he should be  
24 clarified as to the scope of what he's testifying  
25 about.

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1 MR. GRIFFIN: Your Honor, we are going to  
2 object to the Court instructing the witness before I  
3 even ask a question. I'm going to ask the precise  
4 question that Your Honor asked me to ask.

5 THE COURT: Well, what I'm going to do is I'm  
6 going to recess matters right now. I'm going to let  
7 the jury go. I want to take it up with the witness to  
8 make sure he understands what we're talking about. If  
9 there is an issue on this 30(b)(6), I'll take it now as  
10 well.

11 MS. BUTLER: Take it up now?

12 THE COURT: Yeah.

13 MS. BUTLER: Because I'm not sure that we --  
14 can we gather the information to get you in the  
15 morning --

16 THE COURT: Right.

17 MS. BUTLER: -- or later on today?

18 THE COURT: Right. All right. Okay.

19 MR. GRIFFIN: No more questioning will be  
20 today?

21 THE COURT: Right.

22 MR. GRIFFIN: Okay.

23 (Proceedings continued in open court, as follows:)

24 THE COURT: Ladies and gentlemen of the jury,  
25 we are going to take our evening recess at this time.

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1 There's a number of legal issues that the Court needs  
2 to deal with. So I'm going to release you for the  
3 evening at this time. You will report back to the jury  
4 room tomorrow at 9:15, and we'll begin hopefully at  
5 9:30.

6 As I indicated to you during the recess,  
7 please do not discuss this case with anyone. I'm sure  
8 there will be family and friends who are curious about  
9 how you spent your day. Just tell them that you are  
10 under instructions not to talk about the case with  
11 them. And certainly don't do any kind of Internet  
12 research or review of anything that you've heard here  
13 today.

14 So with those instructions, you're excused to  
15 until tomorrow.

16 (The jury exits at 5:23 p.m.)

17 THE COURT: All right. Doctor, would you  
18 have a seat for a moment.

19 Have a seat, please.

20 Doctor, the question I have for you is your  
21 knowledge of these individuals, these other individuals  
22 that have had hand injuries that have affected their  
23 ability to shoot, within what context did you acquire  
24 that information?

25 THE WITNESS: That would primarily be records

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1 reviewed.

2 THE COURT: For what purpose?

3 THE WITNESS: Mainly for this case. Is that  
4 what you meant?

5 THE COURT: Well, I'm asking. Is it within  
6 any context other than for the purposes of this case?

7 THE WITNESS: Primarily for the purposes of  
8 this case. The first thing we would do when a case  
9 like this comes up is we would look at our board  
10 process that looks at people who have chronic or  
11 permanent injuries that go to a board of their peers to  
12 determine whether they can continue in their duty.

13 And if they have returned to full duty,  
14 oftentimes I'll forget about them because they're not  
15 ones that we continue to need action medically on.

16 So the main differential is was it a  
17 permanent injury that did not return to full duty.  
18 Then we would have better track of those. Or are they  
19 ones that recovered to the extent they could return to  
20 their duties?

21 THE COURT: So the medical records you were  
22 provided were given to you as a result of Mr. Slaby's  
23 claim; is that right?

24 THE WITNESS: Essentially, yes.

25 THE COURT: What was the purpose of giving

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1 you those documents?

2 THE WITNESS: Well, two of them we knew about  
3 were active cases, the first two I mentioned, because  
4 those were readily in mind. The other ones, we went  
5 back to the field nurses to ask them for cases that  
6 they had familiarity with that were of this type.

7 THE COURT: For what purpose was that?  
8 That's what I'm --

9 THE WITNESS: For the specific question that  
10 came up on Mr. Slaby.

11 THE COURT: But was it for the purposes of  
12 your own internal review and processes, or was it for  
13 the purposes of responding specifically to discovery  
14 requests or --

15 THE WITNESS: Discovery, yes, sir.

16 THE COURT: All right. Mr. Griffin, did you  
17 want to lay any other foundation with him? Do you want  
18 to explore anything else that you think would allow him  
19 to testify?

20 MR. GRIFFIN: Sure.

21 BY MR. GRIFFIN:

22 Q Dr. Yoder, you were asked by the FBI to appear for  
23 a deposition to testify about these agents; were you  
24 not?

25 A Correct.



Yoder - Direct

1 Q Okay. And you did testify about these agents?

2 A Yes.

3 Q And you're familiar and know well the Sub-M files  
4 and how to interpret them for the ladies and gentlemen  
5 of the jury?

6 A It's easier when I have them in front of me, but  
7 yes, I have some recollection of each of them.

8 Q Sure. In other words, you knew that the FBI had  
9 designated you to testify about these agents and their  
10 injuries?

11 A I believe so, yes.

12 Q Okay. And you prepared yourself by reviewing  
13 those documents to give testimony about what had  
14 happened with those agents vis-a-vis their firearms  
15 restrictions and catastrophic or severe hand injuries?

16 A Yes.

17 Q And you were able to communicate exactly what the  
18 decision making was and to determine which of those  
19 agents had severe, permanent hand injuries and were not  
20 firearms restricted, correct?

21 A Yes. To the extent that that information was in  
22 the medical file, yes.

23 Q Sure. But what I'm saying is that you -- as a  
24 medical officer, you have the foundation to be able to  
25 talk about and to give testimony about those Sub-M

Yoder - Direct

1 files?

2 A Yes.

3 Q And you work with them every day?

4 A Almost every day, yes.

5 Q And you were able to spend several hours talking  
6 to me and sharing the FBI's position with respect to  
7 those four agents that we discussed on May 22, 2013?

8 A Yes.

9 Q And that was the day that the FBI designated you  
10 to talk about those four agents?

11 A Yes.

12 Q And in terms of the way we covered it, not to  
13 belabor the point, but in your fitness-for-duty  
14 examinations, you on occasion actually reviewed FFD  
15 files to make sure of consistency and to make sure you  
16 are applying the same kind of rationale; did you not?

17 A Yes.

18 Q In other words, for example, K.K. -- excuse me,  
19 not K.K., but T.F., the gentleman from New York that  
20 had the boat accident, or S.R., as part of your  
21 official duties sometimes you review other  
22 fitness-for-duty files to see how certain cases were  
23 handled; don't you?

24 A Yes.

25 Q And in connection with S.R. and T.F., as we've

Yoder - Direct

1 called them so far, and I guess they're -- you know  
2 we're talking about Tim Flaherty and Sheila Ryan,  
3 right?

4 A Yes.

5 Q And in connection with those two files, you  
6 actually went through and looked at other Sub-M files,  
7 people who had had hand injuries to see what HCPU had  
8 done in other situations with hands, correct?

9 A Based upon the discovery question, yes.

10 Q Right. But not just in connection with the  
11 discovery, but to make sure that HCPU stayed on the  
12 same page in evaluating T.F., Tim Flaherty, and Sheila  
13 Ryan as well, right?

14 A I wouldn't have gone back to look for others, no.

15 Q But you did look at some other Sub-M files of  
16 people with hand injuries when you and Dr. Wade were  
17 deciding what to do with S.R. -- with Sheila Ryan and  
18 with Tim Flaherty, right?

19 A No, not really.

20 Q What does that mean, not really?

21 A We wouldn't go back. We would base it on -- I  
22 mean, each case is independently evaluated. There's  
23 specific details of the case that would be based upon  
24 the essential duties just like for an applicant.

25 Q Right. But I thought you told me in a close case,

Yoder - Direct

1 you guys would look at other Sub-M files to make sure  
2 you were acting consistently, at least following the  
3 same kind of criteria?

4 A Those that were on record, yes --

5 Q Okay.

6 A -- if I had looked at previous ones. But I  
7 wouldn't go out searching for Sub-M files, the ones  
8 that I had no familiarity with normally.

9 Q But in any event, even those that you didn't have  
10 any personal involvement with, you were able to review  
11 and give testimony about those files and the FBI  
12 designated you to do so, correct?

13 A Yes.

14 Q And you did so cooperatively?

15 A To the extent that I could, yes.

16 Q All right. We talked about them fully, about  
17 their severe injury and the fact that they were not  
18 restricted from firearms despite their limitations?

19 A I think most of them were restricted.

20 Q For some period of time?

21 A Yes.

22 Q Right. We'll talk about that in a moment, what  
23 time they're restricted and when they're released. But  
24 you had enough understanding of those Sub-M files to  
25 express the FBI's position on those agents?

Yoder - Direct

1 A Pretty much, yes. It was in the medical file.

2 Often the firearms information is spotty and the Sub-M  
3 files. That's all.

4 Q No problem. Some of these folks that we talked  
5 about, you actually had a role in the evaluation, such  
6 as Ms. Ryan, Mr. Kolbye, Mr. Saturno, Mr. Fung? These  
7 are people you actually have had some involvement with,  
8 correct?

9 A I don't recognize the Fung case. I'd have to look  
10 at that one.

11 Q But Saturno you remember?

12 A I believe so, yes.

13 Q We talked about Sheila Ryan, right?

14 A Correct.

15 Q We talked about Kolbye?

16 A Kolbye.

17 Q You can't remember Fung, but am I missing one  
18 still? Oh, Jill Blackman, Jill Blackman, the recent  
19 one.

20 A Okay. I did not write up her case, but I'm  
21 familiar with it.

22 Q Okay. So at least -- let me count them -- five  
23 out of the six?

24 A (Nods head up and down.)

25 Q You've had some role yourself?

Yoder - Cross

1 A Yes.

2 Q The only one that you didn't have any personal  
3 involvement was Robert Drdak, right?

4 A That sounds right.

5 Q Okay. Because you got there in what? '88 or '89?

6 A '98.

7 Q '98. Excuse me.

8 And he retired sometime about that time?

9 A Mr. Drdak retired in '99, as I recall.

10 Q Okay. Right. But did you -- was it established  
11 or not -- or I can't remember. Maybe you can. Did you  
12 have some involvement with his Sub-M file before he  
13 retired?

14 A I don't think at all, no.

15 Q Okay. So that one among the six, but you still  
16 were designated by the FBI to testify and give  
17 testimony about Mr. Drdak when we spoke on May 22; am I  
18 right?

19 A Yes. He was a part of the discovery, yes.

20 Q You were designated to talk medically about those  
21 agents who had the hand injuries, who were allowed to  
22 be restricted or not restricted from firearms?

23 A Correct.

24 THE COURT: Mr. Kim, do you want to ask  
25 Dr. Yoder any questions about this issue?

Yoder - Cross  
CROSS-EXAMINATION

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BY MR. KIM:

Q Dr. Yoder, do you know what a 30(b)(6) witness is?

A What a what?

Q A 30(b)(6) witness, do you know -- are you familiar with that term at all?

A I am not.

Q So would you know what it means in legal terms to be designated as a witness to testify about documents?

A I'm just asked to appear by the FBI. That's all I know.

Q And did you have any personal recollection of the medical records of Agent Kevin Kolbye before this litigation?

A I remember, when I reviewed the record, doing his exam in 2006, but that's really the only one that I've had.

Q And Sheila Ryan?

A She was a board case. So I was more intimately involved in her case.

Q And did you have any recollection of Mr. Saturno until this case?

A No. I had to review the Sub-M, but I did return him to duty, I noticed, in 2004, I believe.

Q I think we've already established that Mr. Drdak

Yoder - Cross

1 retired before you arrived at the agency. Is that  
2 correct?

3 A We had about a year overlap, but it was -- I had  
4 no knowledge of his case at the time.

5 Q Do you have any idea who Eleazar Vasquez is?

6 A These names are familiar, but I have no knowledge  
7 of the details of the case.

8 Q Or -- and I think you said the same thing for  
9 Mr. Fung.

10 A Right.

11 Q And did you have any personal involvement in the  
12 fitness-for-duty examination of Ms. Blackman?

13 A I did not.

14 MR. KIM: That's all I have, Your Honor.

15 THE COURT: All right. Thank you.

16 Dr. Yoder, you're excused until tomorrow  
17 morning at 9:30. Please do not discuss your testimony  
18 outside of the courtroom during the evening recess.

19 THE WITNESS: Yes, sir.

20 THE COURT: You're excused.

21 THE WITNESS: I can leave now?

22 THE COURT: Yes.

23 (The witness exits at 5:34 p.m.)

24 THE COURT: Mr. Griffin, do you want to say  
25 anything more about this?



1 MR. GRIFFIN: No. I'm ready to finish my  
2 examination of him. I think I've got about 30 minutes,  
3 45 minutes to finish up.

4 Some of these I thought I made clear. I'm  
5 not going to talk about whoever Mr. Eleazar or whatever  
6 that name was. The only six, I think, that he's  
7 testified about and have any knowledge about are going  
8 to be the four that we spoke to him about on May 22,  
9 those being Ryan, Drdak, Saturno, and Kolbye.

10 And I'm also going to ask him to save time --  
11 instead of having Dr. Wade do it -- to testify about  
12 the other two. When Dr. Yoder wasn't available, they  
13 gave us Dr. Wade later, and he testified about the  
14 other two, the other two being Mr. Fung and  
15 Ms. Blackman.

16 THE COURT: All right.

17 MR. GRIFFIN: And so that's what our  
18 intention is to do, and we expect -- I think that I can  
19 get him through with 30 to 45 minutes in the morning.

20 THE COURT: All right. Mr. Kim, do you want  
21 to speak anymore about this?

22 MR. KIM: No, Your Honor, I don't have  
23 anything. I think it's clear that he got most of his  
24 personal knowledge through this litigation.

25 THE COURT: All right. Based on what I've

1 heard, I'm going to allow Dr. Yoder to testify as to  
2 his knowledge and information he has based on both his  
3 personal involvement and also based on the documents  
4 that were provided to him by the FBI. Obviously, they  
5 were provided to him for some purpose in connection  
6 with testifying.

7           While he may not have been formally  
8 designated as a 30(b)(6) on these issues, he was  
9 certainly provided documents and information. So he  
10 was in a position to testify knowledgeably with respect  
11 to them. So I am going to allow him to testify on  
12 these issues tomorrow morning.

13           All right. Anything else before we recess  
14 for the evening?

15           I'm going to give you an opportunity to say  
16 what you want about your motion for reconsideration,  
17 Ms. Butler.

18           MS. BUTLER: Would you like me to proceed  
19 now?

20           THE COURT: Yes.

21           MS. BUTLER: Your Honor, the reason that we  
22 filed this motion for reconsideration is because we  
23 think that some of the factual underpinnings to what  
24 the government has said about this matter need to be  
25 clarified and some of the legal propositions that they

1 were putting forward similarly.

2           Let me start with the facts. The facts are  
3 this: On April 3, Mark Crider was told that he was  
4 going to be asked to give a deposition in this case.  
5 That very day, as part of his duties, he has the  
6 obligation to inform his chain of command. So he first  
7 went to the ASAC, the assistant special agent in  
8 charge, in his office, a man named G.B. Jones, but  
9 Mr. Jones was out of the office on a special  
10 assignment.

11           So then his next step -- this is part of his  
12 duties -- was to go to Ms. Carlson and tell her, I've  
13 been asked to give a deposition. This is what he has  
14 to report for logistics purposes, for the approval  
15 purposes. So she then ushers -- says, Come into my  
16 office. And then she starts this diatribe about how he  
17 should testify.

18           THE COURT: I understood all of that.

19           MS. BUTLER: Mind you, this is not the first  
20 time this happened. Because in 2011, Mr. Crider was  
21 just having lunch with Justin Slaby, and when he got  
22 back to --

23           THE COURT: Well, it was the first time it's  
24 happened with Ms. Carlson, correct?

25           MS. BUTLER: It is the first time, but

1 Mr. Jones, Mr. G.B. Jones, had done it before, and the  
2 SAC at the time was a woman named Nancy McNamara. And  
3 she had done this. Okay. So this is all part of  
4 official duties to inform your chain and then you get  
5 this diatribe.

6 But when Mr. Crider left, he went and told  
7 two FBI lawyers. Did they report it as they're  
8 required to do? As they say, they take this thing so  
9 seriously. Did either of them report it? No.

10 What happened, we believe the evidence shows,  
11 is that they waited until the day of Mr. Crider's  
12 deposition to see if he would testify the way they  
13 wanted him to and to see if I would have the wisdom to  
14 ask him the right question.

15 And when he confessed this, they didn't go  
16 then. They didn't stop the deposition and say, This is  
17 incredible. What happened is that Mr. Ates told them,  
18 told these two lawyers here, this is a serious matter,  
19 and we are going to have to take it to the Court.  
20 That's when they reported it.

21 So this fiction that they immediately jumped  
22 on it is false. And the other part of the fiction,  
23 Your Honor, is that the day before this evidentiary  
24 hearing that Judge Davis called this same Nancy  
25 McNamara -- the same woman who had already reamed

1 Crider out for talking to Justin Slaby is now the head  
2 of the FBI's Inspections Division, and she tells  
3 Ms. Carlson, By the way, you don't need to testify  
4 tomorrow. And that is on the record. Because  
5 Ms. Carlson says, I got a call from Nancy McNamara that  
6 said I don't have to testify.

7 All right. They said that was because they  
8 were so concerned about getting the truth out. They  
9 haven't done anything yet. In fact, the FBI has said  
10 repeatedly over and over in papers that they can't even  
11 tell this Court or Judge Davis whether this even  
12 happened because that would be wrong. So now it's been  
13 seven weeks since they supposedly started an  
14 investigation, and they haven't concluded it. So the  
15 idea that they were moving as quickly as they can and  
16 that they take seriously what happened, I think, is  
17 fundamentally undermined by the time line. That's one  
18 thing.

19 The second thing is they have said they  
20 believe that this cannot come into evidence, something  
21 that every court that's looked at it says this is  
22 fundamentally a sign of a weak case when a party  
23 engages in witness tampering, fundamentally a sign of a  
24 weak case. They say it can't come in because the woman  
25 wasn't acting in the scope of her employment. And as

1 we said in this motion for reconsideration, she was  
2 certainly acting in the scope of her employment. She  
3 was the person that he had to go to. She was the  
4 person who would receive this information.

5 And I would note that while they deal with  
6 the case of *Martin v. Cavalier* in a footnote, that is a  
7 case, Your Honor, where a person was found to be in the  
8 scope of employment when assaulting people. Right,  
9 because the person was on the work site. It happened  
10 during working hours. He was a supervisor. You don't  
11 have to be the top dog.

12 But the scope of employment is a concept that  
13 they just have never said -- they've never taken any  
14 position. They've never provided any facts. And by  
15 the way, they have the duty to prove she is not in the  
16 scope of employment. They have provided no facts at  
17 all. The only facts have come from us, which are that,  
18 of course, she was the person he had to go to.

19 And then you get into this. So that's one  
20 issue. And as I said, there are cases that we've cited  
21 them where the person has created criminal and engaged  
22 in criminal conduct, where they engaged in fraud, where  
23 they had assaulted people, but they were in the  
24 workplace. They were in working hours, and they were  
25 in the scope of --

1 THE COURT: Have you found any case where  
2 somebody who was not involved and had no involvement in  
3 the underlying decision, who did something comparable  
4 years after the underlying events? I mean, is there  
5 any case that you think is comparable to the facts of  
6 this case?

7 MS. BUTLER: There are a number of employment  
8 cases, Your Honor, that say that a statement that's  
9 made after the fact can be just as powerful as a  
10 statement made at the time.

11 THE COURT: By somebody who had no  
12 involvement with the underlying events?

13 MS. BUTLER: As Judge Davis said, when --

14 THE COURT: There may be all kinds of  
15 integrity issues triggered by this, and I don't  
16 minimize those for a minute. But the issue is whether  
17 any of this is probative of why he was dismissed from  
18 the academy two years earlier by people who had  
19 absolutely no connection to Ms. Carlson.

20 MS. BUTLER: She was the one who had the  
21 connection to the witness, who can prove the case. We  
22 have already heard it, Your Honor. We have already  
23 heard it in opening that Mark Crider --

24 THE COURT: But as I understand the facts,  
25 whatever she said had absolutely no influence on the

1 truthfulness of his testimony. You have conceded that,  
2 correct? So you are not offering it to impeach him in  
3 any way, correct?

4 MS. BUTLER: No, but it's a sign of a weak  
5 case. It doesn't matter. It is attributable to the  
6 organization when it happens just like the assault is,  
7 Your Honor. If we had a sexual --

8 THE COURT: I understand. But these are all  
9 the same issues that you raised in one fashion or  
10 another, and that relates to whether the degree to  
11 which whatever Ms. Carlson said should be viewed as  
12 speaking on behalf of the organization of the FBI.  
13 That's what it comes down to. It comes down to an  
14 argument that that is a party admission, correct?

15 MS. BUTLER: And what this motion for  
16 reconsideration also deals with is the misnomer that it  
17 is a party statement, you know, that it's an admission.  
18 The idea that it needs to be authorized is specifically  
19 rebutted in the case law. Because, obviously, no one  
20 is going to authorize somebody to assault someone, to  
21 steal money from them, to create fraud. That is not an  
22 authorized act. But just as those acts are within the  
23 scope of employment and are properly discussed with the  
24 jury, so is this one.

25 And in fact, as I said, our review is that



1 every case in the country that has dealt with this --  
2 and thank the Lord there haven't been very many. I  
3 will grant you. Thank the Lord there haven't been very  
4 many. But they say it is admissible because when a  
5 party tries to tamper with a witness -- they don't say  
6 tamper with the plaintiff; they say tamper with a  
7 witness -- it is a sign of a weak case.

8 THE COURT: My question is that is there any  
9 case that you rely on where the person who made the  
10 attempts was as attenuated and as remote to the  
11 underlying events, both in terms of personal  
12 involvement and in terms of time, as Ms. Carlson was in  
13 this case?

14 MS. BUTLER: My cocounsel has handed me a  
15 note which I think has a very relevant point, which is  
16 that people that engage in spoliation in cases have  
17 nothing to do generally with the underlying facts. We  
18 have many cases that say that. And so we would be  
19 happy to present those, but --

20 THE COURT: This is not spoliation. This is  
21 not spoliation. This is --

22 MS. BUTLER: No. But it's a -- I think it's  
23 worse because it is an attempt -- like spoliation, it  
24 is an attempt to not have the truth come out.

25 And when you say is attenuated, the fact of

1 the matter is that she is not at all attenuated from  
2 the witness she's tampering with. That's the analysis.  
3 The analysis is the woman is -- she's telling  
4 Mr. Crider, FBI headquarters is mad that we even put  
5 up -- there is a connection there. Your Honor, we  
6 wanted to get at that connection. I don't think it's  
7 appropriate that the fact that they tell her not to  
8 testify, the fact that they don't really investigate  
9 very promptly means that we can't even inquire of her  
10 what happened, but this assumption is made that nothing  
11 happened.

12 In other words, we wanted to probe it to the  
13 end but she -- because she had nothing to do with  
14 Justin Slaby, she has everything to do -- as Judge  
15 Davis said, she inserted herself in the case when she  
16 took it upon herself to try to change the outcome of  
17 the case. How much more intertwined can you get with a  
18 case than when you try to remove basically a witness  
19 from the stand?

20 That's what we don't understand. That's why  
21 we think it's so important to look at the law that says  
22 it's a sign of a weak case. No. Is it a matter of  
23 law? No. If they want to get up and have somebody  
24 say, Look, we really took this very seriously, let us  
25 explain how -- if they want to get up and say, as they

1 said before, Mr. Crider, after you reported this  
2 witness tampering, did the lawyers tell you to lie or  
3 did they tell you to tell the truth? And he'll say,  
4 Well, they told me to tell the truth. Well, after the  
5 cat's out of the bag, I don't think that's so  
6 surprising. But it is a fact --

7 THE COURT: Well, they told him to tell the  
8 truth immediately, correct?

9 MS. BUTLER: After he reported the witness  
10 tampering.

11 THE COURT: No. As I understand the facts,  
12 the same day or within a very short time after he was  
13 approached by Ms. Carlson, he reported the conversation  
14 to two persons, both of which told him to tell the  
15 truth, correct?

16 MS. BUTLER: Afterwards. And those are the  
17 same people, Your Honor, who did not report it.

18 THE COURT: But it was within a very short  
19 period of time.

20 MS. BUTLER: I know. So I tell you:  
21 Somebody tried to, you know, tamper with me. You're a  
22 lawyer, and you are going to say, Well, go with it. I  
23 mean, obviously, after the fact. But I think the proof  
24 is in the pudding, Your Honor, because neither one of  
25 those people reported it.

1 THE COURT: They were both outside of the  
2 Milwaukee office; weren't they?

3 MS. BUTLER: No. They were there. They had  
4 an obligation.

5 THE COURT: No. I'm talking about the  
6 general counsel. They were people who were outside of  
7 the Milwaukee office, correct?

8 MS. BUTLER: The Office of General Counsel.

9 THE COURT: Yes.

10 MS. BUTLER: Yes, they are outside.

11 THE COURT: All right.

12 MS. BUTLER: The last thing, as we said, is  
13 apparent authority is that the FBI had clunked her in  
14 authority. Under the case law on that, again, the  
15 issue is not whether she is authorized to do something.  
16 It is whether they have created the conditions where  
17 she can do something. Because, Your Honor, in every  
18 employment case, you have somebody doing bad stuff.  
19 You have somebody lying. And if lying gets in, as  
20 *Reeves v. Sanderson Plumbing* says it does, telling  
21 somebody to lie is the flip side of that coin.

22 THE COURT: I understand your position.

23 MS. BUTLER: Thank you.

24 My cocounsel is saying that I have not made  
25 it clear. I want to be sure that it is clear that

1 there was a six-week time span between the day it was  
2 reported and the date of the deposition. Nothing  
3 happened. These lawyers did nothing. They did nothing  
4 until Mr. Ates told them this matter was going to go  
5 outside the FBI.

6 THE COURT: I understand.

7 MS. BUTLER: Then they also waited to see if  
8 he would take the bait.

9 THE COURT: I understand.

10 Ms. Wetzler.

11 MS. WETZLER: Your Honor, quite simply, the  
12 Court got it right the first time. On a motion for  
13 reconsideration, as the Court is well aware, there are  
14 usually three grounds on which the Court might revisit  
15 a ruling, an intervening change in the controlling  
16 law -- we don't have that here -- newly discovered  
17 evidence -- nothing that Ms. Butler has told you today  
18 was not already available previously in the  
19 litigation -- and third, to correct a clear error of  
20 law or a manifest injustice. We don't have that  
21 either.

22 Your Honor is quite right. This is a *sui*  
23 *generis* situation. This is a situation like no other  
24 where the -- and the plaintiff has not been able to  
25 point you to any case that would suggest that the

1 ruling Your Honor found was wrong. They have not found  
2 any case where someone who had no involvement  
3 whatsoever in the employment action at issue, two years  
4 after the relevant decision made comments that  
5 reflected personal opinion.

6           This is simply not a situation that is common  
7 in the case law, and there is a reason that they  
8 haven't been able to find it. It's a very unique  
9 situation, and it's a situation that, quite frankly,  
10 Your Honor was correct in finding is not the proper  
11 subject for this trial. It would violate Rule 401 and  
12 403, not only 801(d)(2)(D). Your Honor ruled on three  
13 separate grounds. The issues that we have heard  
14 Ms. Butler speak mostly about are 801(d)(2)(D) issues,  
15 not 401 issues, not 403 issues. All of those are a  
16 proper basis for objections.

17           The most glaring case that's absent from the  
18 plaintiff's motion for reconsideration that was filed  
19 late last night is *Parker v. Danzig*. Actually, there  
20 are two cases, *Parker v. Danzig* and *Young v. UPS*. They  
21 do attempt to distinguish *Young v. UPS*, although not on  
22 any cognizable ground that should change this Court's  
23 finding that that case is controlling.

24           But there is no attempt to come to terms with  
25 *Parker v. Danzig*. That's the closest case that we

1 have. It is an 801(d)(2)(D) case that specifically  
2 held that in employment discrimination cases like this  
3 one, scope of employment means involvement in the  
4 plaintiff's employment decisions. That is an EDVA case  
5 that relied on Fourth Circuit law, not on the law of  
6 other circuits that plaintiff has cited.

7 And Your Honor has already dealt with the  
8 *McQueeney* case. That's the one that plaintiff keeps  
9 coming back to, but it is clearly distinguishable for  
10 the reasons that Your Honor pointed out in your order.

11 Ultimately, plaintiff is resorting to trying  
12 to malign efforts by the FBI to do the right thing  
13 here. What happened in Milwaukee, Your Honor, is quite  
14 right. The two people who immediately found out about  
15 this matter immediately told Mr. Crider that he needed  
16 to tell the truth first and foremost. That was the  
17 same day as the comments were made. In addition, CDC  
18 Kalb admonished SAC Carlson the very same day and said,  
19 You can't say that.

20 And counsel questioned CDC Kalb quite heavily  
21 at the evidentiary hearing as to why didn't you report  
22 this that day, and she said -- or anytime thereafter.  
23 And she said, Because I didn't understand it as an  
24 attempt to suborn perjury. I thought it was an  
25 ill-advised, off-the-cuff remark. Those are her words.

1           And so by the time it became evident that  
2 plaintiff's counsel -- that something bigger may have  
3 happened -- and again, we can't take a position because  
4 of the pending investigation. But by the time it  
5 became evident that there was even a possibility that  
6 something more significant had happened, that was the  
7 time of the deposition. And it was that very same day  
8 that the Office of General Counsel in Washington, D.C.,  
9 the deputy general counsel reported the matter to the  
10 Inspections Division, and it is now under a pending  
11 investigation.

12           Now, Your Honor's ruling, frankly, didn't  
13 even turn on the question of repudiation. I offer  
14 these thoughts simply because I can't let stand the  
15 suggestion that the FBI has not taken this seriously.  
16 So I offer those points simply to make clear that the  
17 FBI has acted properly but fundamentally.

18           This is an 801(d)(2)(D) problem. The  
19 controlling law here is *Young v. UPS* and *Parker v.*  
20 *Danzig*, not the cases the plaintiff has cited. And we  
21 have a 401 and 403 problem. The 403 prejudice here far  
22 exceeds any possibility of probative value.

23           Thank you.

24           THE COURT: All right. Thank you.

25           All right. Ms. Butler, I'll let you have the



1 last word on this.

2 Go ahead.

3 MS. BUTLER: Your Honor, in terms of  
4 Ms. Wetzler's comments about 401, that's why I was  
5 discussing with you the case law that says an attempt  
6 to tamper with a witness is a sign of a weak case. It  
7 is very relevant. It is highly relevant. A number of  
8 cases have been reversed because such evidence was not  
9 allowed in.

10 In terms of 403, the question is whether it  
11 is unfairly prejudicial. It is also prejudicial to  
12 have the -- that the employer assaulted somebody. That  
13 somebody created some kind of criminal problem, that  
14 there was fraud, but that doesn't make it unfairly  
15 prejudicial. And we do not think it is. Because the  
16 case law, which Ms. Wetzler ignores, is that it is a  
17 sign of a weak case.

18 In terms of scope of employment, we did prove  
19 scope of employment. That is what I was just talking  
20 about, working hours. It is her position you have to  
21 go to -- she is the big boss. She tells you to come in  
22 her office. You can't very well say no, I'm not going  
23 to go. That's scope of employment. It's being able to  
24 control that situation.

25 Of course, no one authorizes criminal

1 conduct; although, we would like to get at who actually  
2 did authorize it. But that's not the question for  
3 801(d)(2)(D). And the case law says it doesn't have to  
4 be authorized. It can be against every policy that the  
5 employer has, and it still comes in. It is still  
6 relevant.

7 I, frankly, am shocked that the FBI continues  
8 to say, We get a pass. They haven't brought up anybody  
9 who has questioned Mr. Crider's integrity. What we  
10 have here, Your Honor, is only a few people will do  
11 what Mark Crider did. We all know that from human  
12 nature. Most people will tow the line, and I'm sure  
13 Your Honor has seen that in affidavits filed in cases  
14 when you get the person up on the stand and they say,  
15 Well, they told me to sign it.

16 They waited to see if that's what Mr. Crider  
17 would do, and now it's sort of an open season on  
18 anybody. That's exactly what Magistrate Davis said.  
19 This becomes open season in the Eastern District of  
20 Virginia. The FBI knows witness tampering is good to  
21 go.

22 It is not good to go, Your Honor. It is a  
23 sign of a weak case, and an agent, special agent who  
24 has experienced it, who is supposed to be investigating  
25 criminal misconduct, not being a victim of it, should

1 have the right to say that on the stand because it is  
2 very much a part of our case.

3 And I understand that Magistrate Davis has a  
4 lot more experience with what has happened to the run  
5 up with the trial than you do, Your Honor, but this is  
6 part of a pattern of misconduct that we've seen. This  
7 is not standing alone, but it is the one we would like  
8 to share with the jury.

9 Will we talk about some of the other -- I  
10 mean, we're not going to get the lawyers on the stand  
11 and say why did it take you until three days before an  
12 extended discovery cutoff after we had given them the  
13 names of all of these six people -- that now they are  
14 trying to keep Mr. Griffin from talking about. Why did  
15 it take you that long when you knew their names to give  
16 us those names?

17 THE COURT: You are moving to another issue.

18 MS. BUTLER: I'm just saying that it is a  
19 serious matter.

20 THE COURT: I understand.

21 The plaintiffs have filed a motion for  
22 reconsideration of the admissibility of Carlson's  
23 statements to Crider, specifically, to this Court's  
24 order dated July 25 granting the defendant's motion in  
25 limine to exclude evidence relating to allegedly

1 sanctionable conduct. The Court has reviewed the  
2 motion.

3 The Court concludes that plaintiffs have  
4 failed to establish any grounds for reconsideration.  
5 Everything they've proffered to the Court by way of  
6 their motion for consideration was presented to the  
7 Court in connection with its initial consideration of  
8 the motion, and the Court understood their positions as  
9 they've reiterated them in the motion for  
10 consideration.

11 More importantly, the Court has reconsidered  
12 its order and has concluded that the order was, in  
13 fact, correct for the reasons that the Court stated in  
14 the order.

15 So for those reasons, the Court is going to  
16 actually grant the motion for reconsideration but upon  
17 reconsideration affirm its order granting defendant's  
18 motion in limine to exclude evidence relating to  
19 allegedly sanctionable conduct for the reasons stated  
20 in its previous order dated July 25, 2013.

21 Anything else?

22 MR. GRIFFIN: Your Honor, in terms of  
23 housekeeping, as Your Honor knows, we have to proffer  
24 the three witnesses with knowledge of Ms. Carlson's  
25 conduct. Those three witnesses would be Special Agent

1 Crider. We will have to proffer him outside the  
2 presence of the jury so that Your Honor then can make a  
3 ruling on the merits. I know it seems archaic, but I  
4 think the Fourth Circuit makes us actually have you  
5 listen --

6 THE COURT: You can just file something  
7 summarizing the proffer in written form.

8 MR. GRIFFIN: I don't think the Fourth  
9 Circuit is going to allow us. I think they're going to  
10 require us to actually question him and offer our  
11 proffer.

12 THE COURT: Well, then they can reverse me  
13 because I'm not going to spend time putting witnesses  
14 on for proffers. You can put it in a written statement  
15 what the proffer would be of any of the witnesses that  
16 you would have produced on this issue.

17 MR. GRIFFIN: What kind of proffer will you  
18 say is sufficient for Your Honor with respect to  
19 Section Chief Smith?

20 THE COURT: Whatever you would expect him to  
21 say. So you can just proffer whatever you would expect  
22 those people to say and just put it in a written  
23 proffer and file it with the record of the case.

24 MR. GRIFFIN: And Ms. Carlson, she's under  
25 subpoena. Our intention -- I'm assuming Your Honor

1 will not allow us to proffer her testimony or her  
2 responses to questions.

3 THE COURT: Well, if I had allowed you to go  
4 down this road, proffer whatever evidence you would  
5 have proffered.

6 MR. GRIFFIN: Well, we can't proffer it  
7 because we don't have it.

8 THE COURT: Well, if I had allowed you to put  
9 it on, what would you have done?

10 MR. GRIFFIN: We would have played it in  
11 front of the jury. My understanding -- I'll certainly  
12 rely on Mr. Ates.

13 THE COURT: You would have put on Agent  
14 Crider.

15 MR. GRIFFIN: In front of the jury.

16 THE COURT: Right.

17 MR. GRIFFIN: But as I understand the Fourth  
18 Circuit law, it is not adequate for us. Unless you do  
19 tell us, I will not allow you to make your proffer --

20 THE COURT: I will allow you to make a  
21 proffer. I'm just telling you how to do it. Just go  
22 ahead and put it on the record. I'll even let you at  
23 some point do it orally, or you can put it in writing.  
24 But I don't see any reason for you to actually call any  
25 of these witnesses.

1 MR. GRIFFIN: Not in front of the jury.

2 THE COURT: Or in court.

3 MR. GRIFFIN: For any purpose at all?

4 THE COURT: Well, for the purposes of your  
5 proffer, and I understood you are going to call Agent  
6 Crider.

7 MR. GRIFFIN: Right. But normally, what we  
8 would do is to say, Your Honor, we're now at the time  
9 of the testimony we need to approach the bench. The  
10 jury would be excused. We would then have those  
11 questions and answers.

12 THE COURT: I don't see any need for that.  
13 You can just do it orally by way of a summary proffer  
14 instead of questions and answers of a witness.

15 MR. GRIFFIN: We will not waste any time.  
16 When it comes to that time, we'll ask to make the  
17 proffer with Special Agent Crider. Your Honor can tell  
18 us not to do that, and then we will do exactly what you  
19 suggested.

20 Thank you, Judge.

21 THE COURT: All right.

22 MS. WETZLER: May I just clarify, Your Honor,  
23 that we would get an opportunity to respond to point  
24 out any objections we would have had to the questions  
25 that Mr. Griffin would have asked?

1 THE COURT: You can file a counter proffer if  
2 you want to do that.

3 MS. WETZLER: Thank you, Your Honor.

4 THE COURT: All right.

5 MR. ATES: I hate to belabor this, Your  
6 Honor. John Ates for Plaintiff Slaby. There's some  
7 Fifth Amendment issues that would have been raised had  
8 Ms. Carlson been allowed to testify. I just want to be  
9 clear on the record that the parties, I believe --

10 Please correct me if I'm wrong.

11 I believe we have stipulated that she would  
12 have invoked the Fifth as to any question offered or  
13 asked by the plaintiff during this proffer. Because as  
14 you well know, that leads to some inferences. We just  
15 want that to be a part of the proffer as well.

16 And I want -- at least I understand the  
17 government's position to be that they agree that  
18 without asking those questions here in court, it was a  
19 proper invocation of the Fifth Amendment right not to  
20 testify by Ms. Carlson. And I can be corrected if I  
21 have that wrong, Your Honor.

22 THE COURT: All right. Well, just include  
23 that as part of your proffer.

24 MR. ATES: Thank you.

25 MS. WETZLER: Mr. Ates does not have that



1 wrong. That was our stipulation. With regard to the  
2 inferences, the reason it's important that we have an  
3 opportunity is that any adverse inference would itself  
4 have to meet the criteria of 401, 403, and other rules  
5 of evidence. So that's why it's important that we have  
6 an opportunity to show why the questions they would  
7 have asked may not have met those criteria; therefore,  
8 an adverse inference would not be appropriate under the  
9 *Custer Battles* case.

10 Thank you.

11 THE COURT: All right. Anything else?

12 (No response.)

13 THE COURT: All right. Stand in recess until  
14 tomorrow morning.

15 -----  
Time: 6:10 p.m.

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I certify that the foregoing is a true and  
accurate transcription of my stenographic notes.

/s/  
Rhonda F. Montgomery, CCR, RPR